No. (1)

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Supreme Court of the United States

October Term, 1995

ANTOINE NASSIMOS, JOSEPH FICHNER, JR., MICHAEL CONROY, ANTHONY ROSSI, DANIEL W. WELTMAN, GEORGE STEINER, WILLIAM A. MOORE, WILLIAM TEDESCO, MICHAEL IGNOZZI and ALAN HANZO,

Petitioners,

vs.

THE NEW JERSEY BOARD OF EXAMINERS OF MASTER PLUMBERS; NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, INC.; BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS; and ROBERT MULLER, individually and in his capacity as an officer of the NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, THOMAS BIONDI and ALAN FEID,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court's decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 449 U.S. 365 (1991), require the grant of state action immunity to private trade associations who engage in unauthorized and unsupervised price fixing, because a state licensing agency later adopted the fixed prices as the reasonable price for its licensees to charge?

2. Did this Court, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 449 U.S. 365 (1991), intend to set aside the result of its earlier decision in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)? Specifically, in the latter case, no immunity from antitrust challenge was given to a system whereby private unsupervised vertically fixed prices were enforced upon third parties by a state agency. The Court of Appeals in this matter, however, held that *City of Columbia* required a grant of immunity to a system of private unauthorized and unsupervised horizontal price fixing because the fixed prices were enforced upon third parties by a state agency.

3. Is the *Midcal* clear articulation element satisfied when a state agency acts in accordance with reasonably foreseeable procedures or should federal courts be required to determine whether the agency's substantive actions were reasonably foreseeable before granting state-action immunity to the agency?

PARTIES TO THE PROCEEDING

Petitioners are all plumbers or plumbing contractors in the State of New Jersey and are residents of the State of New Jersey. At the time of filing of the Complaint all but two of the Petitioners were licensees of the New Jersey Board of Examiners of Master Plumbers. The other two were about to become licensed. The Petitioners were all plaintiffs in the United States District Court and appellants in The United States Court of Appeals for the Third Circuit.

Respondent, the New Jersey Board of Examiners of Master Plumbers (hereinafter referred to as the "Board"), is a New Jersey State administrative agency, authorized by the State Legislature, pursuant to N.J.S.A. 45:14C-1, *et seq.*, to license master plumbers.

Respondent, New Jersey Association of Plumbing, Heating and Cooling Contractors, Inc. (hereinafter referred to as "NJAPHCC"), is a statewide trade association of plumbers and plumbing contractors.

Respondent, Bayshore Association of Plumbing, Heating and Cooling Contractors (hereinafter referred to as "Bayshore") is a local branch of the NJAPHCC.

Respondent, Robert Muller, is a licensed master plumber and a member of the NJAPHCC and Bayshore.

Respondents, Thomas Biondi and Alan Feid were, during periods relevant to the complaint in this matter, presidents of the Board and, at the same time, members of the NJAPHCC.

Each respondent was a defendant in the District Court proceedings and an appellee in the Court of Appeals.

There are no other parties to this action.

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On December 18, 1995, the United States Court of Appeals for the Third Circuit issued its opinion, affirming the decision of the District Court granting the defendants' dismissal and summary judgment motions.

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion of the United States Court of Appeals for the Third Circuit and its judgment of December 18, 1995. A petition for rehearing was timely filed and was denied on January 17, 1996.

Petitioners invoke the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

15 U.S.C. § 1 provides:

> **§1. Trusts, etc. in restraint of trade illegal; penalty**
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other

> person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The relevant portions of the State Plumbing License law, N.J.S.A. 45:14C-1, *et seq.*, are found in the Appendix at pages 16-17a.

STATEMENT OF THE CASE

Petitioners, who are licensed master plumbers of the State of New Jersey, subject to the jurisdiction of the Board, brought a complaint in the United States District Court for the District of New Jersey seeking injunctive relief for violations by the Respondents of the Sherman Act, 15 U.S.C. § 1, and the New Jersey Antitrust Act, N.J.S.A. 56:9-1, *et seq.* Petitioners contend that members of the respondent trade associations had long engaged in price fixing discussions at their meetings. It was price fixing that was neither authorized by statute, nor was it actively supervised by any state officials. The complaint further charged that the Board, which enforces a regulation barring excessive pricing by its licensees, adopted the prices and methods of pricing, as fixed by the trade association members, as the reasonable price and pricing methods to be utilized by its licensees.

Upon receipt of the complaint the Respondents moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and for summary judgment pursuant to Rule 56. Petitioners responded with a cross motion seeking a preliminary injunction and also submitted a Rule 56(f) affidavit seeking discovery so as to be able, *inter alia,* to test the averments in affidavits submitted by the respondents.

Because there were affidavits with exhibits submitted by both sides outside the pleadings, there is a limited record beyond the pleadings. That record revealed that the Board, twice since 1988, brought well publicized excessive pricing charges against one of the Petitioners herein, Joseph Fichner. On both occasions Mr. Fichner was found to have priced excessively in several instances, and, on the latter occasion in 1994, the fines and costs imposed upon him amounted to $44,844.50.

The Board's excessive pricing regulation, N.J.A.C. 13:32-1.12, lists six criteria for consideration in determining whether a price is, in fact, excessive. One of those criteria is "The price customarily charged in the locality for similar services." The Board's written decision in the Fichner matter reveals it was the only criterion relied upon by the Board.

In both sets of hearings against Mr. Fichner, the Board relied upon the testimony of Robert Muller, a licensed master plumber and member of the NJAPHCC and Bayshore, for proof as to "the price customarily charged."

Mr. Muller testified in the first set of hearings in 1989 that the customary charges to the consumer was at a rate of $35.00 to $45 per hour. Charges were made, moreover, solely on a time and material basis, rather than on a flat fee, *i.e.*, one in which the plumber and consumer agree upon a price in advance.

Muller testified how he knew what the customary prices were:

> By dealing with associations I meet a great deal of plumbers. By a great deal, I mean in the numbers 30, 40, sometimes as much as 50 in this environment when things are going — I might meet 75 different plumbers on a monthly basis.

> You must understand, most plumbers are very social animals, they like to talk and we exchange ideas at these association functions. One of those particular things that are discussed is, for example, "Hey, Bob, what are you getting in your shop" Joe's getting this, so-and-so is getting this, how do you figure you can get that?" These type of conversations. That is how I base my knowledge.
>
> In addition to that, I am very friendly, I know a large portion — I don't know everybody, but I know a large portion of plumbers within our local area, meaning the Matawan area. Most of them are [NJAPHCC] association members anyway, and at various times they'll have a complaint about a bill and they'll come back and they'll converse with me in such a way to say "What do you think? You know, am I out of line?" And we talk and "This is what we get per hour, this is what you get per hour." And we compare notes and, by-golly, we ask a third plumber and this is how I compile my information of the general prevailing wage. Because when the conversation is basically all done, *we pretty much fall into a category.*

(Emphasis added).

Mr. Muller further testified that to corroborate his understanding of the prevailing rates charged, prior to testifying, he had additional discussions with competitor plumbers:

> So I went back, again, talking to different members that we have and different plumbers in the area, "How much are you getting an hour?" was the question pretty much. That's pretty much how it's done, that's it.

Lest there be any question that Mr. Muller merely performed a survey at the behest of the Board strictly for the purpose of testifying, the following colloquy reveals that such price discussions were a regular occurrence:

> Q. Can you give us an idea of how many people you talked to?
>
> A. You must bear with me, I'm going to have to leave this very loose, I don't keep an accurate record as the day goes on. But if I talked to 30 people in the month, if I talked to 25 people in a month, that's approximately how many people I talked to. I have no definitive answer.
>
> Q. All right. And are you testifying that in these conversations you do talk about prices —
>
> A. Absolutely.
>
> Q. — on a regular basis at your meetings?
>
> A. Absolutely.

In support of Petitioners' application for a preliminary injunction, Petitioners presented additional proofs that the trade

associations engaged in surveys of current, rather than historical prices charged by their members and also of the Board's antagonism to flat fee pricing.

In the second Fichner hearing the prosecuting Deputy Attorney General made it clear that Mr. Muller's testimony as to how the trade association members operated was how she and the Board expected all of the Board's licensees to operate. It was their obligation to know and follow the prices charged by competitors in their area:

> MS. BERGER: By the rules and regs, every plumber is required to consider the prices charged by everyone in their general area to determine whether those types of prices are conscionable and within the bounds of consumer protection in determining his own prices. Therefore, every plumber, every master plumber is required to have that information.

The District Court, without analyzing the Petitioners' claim and ignoring the Rule 56(f) application, granted the Respondents' motions for dismissal and summary judgment. The court did so on the basis that an excessive pricing rule is a foreseeable result of the statute creating the Board. The court further found, without explanation, that once the Board was entitled to state action immunity, the trade associations were likewise entitled to grant of their motion.

The District Court's ruling was appealed to the United States Court of Appeals for the Third Circuit. That court affirmed, stating solely:

> After consideration of all contentions raised

> by the parties, we find that the above action is directly controlled by the decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991).

A motion for rehearing was thereafter timely filed, but was denied by Order dated January 17, 1996, without substantive explanation.

Petitioners now seek the review of this Court.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RECTIFY A RULING BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT THAT THIS COURT'S DECISION IN *CITY OF COLUMBIA V. OMNI OUTDOOR ADVERTISING, INC.*, 449 U.S. 365 (1991), REQUIRES IMMUNIZATION FROM A SHERMAN ACT LAWSUIT OF PRIVATE PARTIES WHO HAVE ENGAGED IN UNAUTHORIZED AND UNSUPERVISED PRICE FIXING, BECAUSE A STATE LICENSING AGENCY LATER ADOPTED THE FIXED PRICES AS THE REASONABLE PRICE FOR ITS LICENSEES TO CHARGE.

Even if this Court's decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 449 U.S. 365 (1991), is applicable to the facts of this case, under the holdings of that opinion the respondent trade associations should not have been granted antitrust immunity. In using *City of Columbia* as a basis for immunizing private, unauthorized and unsupervised price fixing, the Court of Appeals completely misread that case and

"has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c).

In *Omni*, the City of Columbia, as well as the allegedly favored billboard company, Columbia Outdoor Advertising Co. (hereinafter referred to as "COA"), were accused of being involved in an anticompetitive conspiracy to restrict the size and location of new billboards, to the detriment of the plaintiff. The plaintiff also charged that COA had engaged in other anticompetitive conduct against it, such as trade libel, use of sales at artificially low rates and inducement to breaches of contract.

The Supreme Court, after finding that the City's actions were authorized by the State, granted state action immunity to both the City and to COA. COA's immunity, however, was limited to its lobbying efforts leading to the adoption of the new ordinance.

Where COA's anticompetitive conduct was independent of the City, there was no state action immunity. As the Court said:

> Under *Parker* and [*Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961)], therefore, both the city and COA are entitled to immunity from the federal antitrust laws for their activities relating to enactment of the ordinances. This determination does not entirely resolve the dispute before us, since other activities are at issue in the case with respect to COA. Omni asserts that COA engaged in private anticompetitive actions such as trade libel, the setting of artificially

> low rates, and inducement to breach of contract. Thus, although the jury's general verdict against COA cannot be permitted to stand (since it was based on instructions that erroneously permitted liability for seeking the ordinances, see *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 US 19, 29-30 8 L Ed 2d 305, 82 S Ct 1130 (1962)), if the evidence was sufficient to sustain a verdict on the basis of these other actions alone, and if this theory of liability has been properly preserved, Omni would be entitled to a new trial.

Id. at 384.

The Court of Appeals in this matter, however, did not distinguish between independent anticompetitive conduct and that intimately connected with state conduct for which immunity was granted.

The Court of Appeal's Judgment Order grants immunity for private anticompetitive conduct, just because, after the fact, the Board chose to adopt the results of that conduct as the reasonable price for its licensees to charge. It is a ruling totally contrary to the proscription in *Omni* against a state "exempt[ing] private action from the scope of the Sherman Act." *Omni* at page 379. It is also completely contrary to the Court's more recent decision in *Federal Trade Commission v. Ticor Title Insurance Company*, 504 U.S. 621 (1992), where it said:

> Our decisions make clear that the purpose of the active supervision inquiry is . . . to determine whether the State has exercised sufficient independent judgment and control

> so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the state has played a substantial role in determining the specifics of economic policy. *The question is not how well state regulation works but whether the anticompetitive scheme is the state's own.*

(Emphasis added). *Id.* at 634.

As a result of the Court of Appeal's Judgment Order, an anticompetitive scheme which is not the state's own has been granted immunity.

It is respectfully requested that this Court rectify that grant of immunity.

II.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER THIS COURT, IN *CITY OF COLUMBIA V. OMNI OUTDOOR ADVERTISING, INC.*, 449 U.S. 365 (1991) INTENDED TO SET ASIDE THE RESULT OF ITS EARLIER DECISION IN *CALIFORNIA RETAIL LIQUOR DEALERS ASSN. V. MIDCAL ALUMINUM, INC.*, 445 U.S. 97 (1980). SPECIFICALLY, IN THE LATTER CASE, NO IMMUNITY FROM ANTITRUST CHALLENGE WAS GIVEN TO A SYSTEM WHEREBY PRIVATE UNSUPERVISED VERTICALLY FIXED PRICES WERE ENFORCED UPON THIRD PARTIES BY A STATE AGENCY. THE COURT OF APPEALS IN THIS MATTER, HOWEVER, HELD THAT *CITY OF COLUMBIA* REQUIRED A GRANT OF IMMUNITY TO A SYSTEM OF PRIVATE UNAUTHORIZED AND UNSUPERVISED HORIZONTAL PRICE FIXING BECAUSE THE FIXED PRICES WERE LATER ENFORCED UPON THIRD PARTIES BY A STATE AGENCY.

Petitioners alleged in their complaint that private parties, members of the respondent trade associations, had wrongfully fixed prices for plumbing services. Those prices were fixed without authorization by the state or active supervision by the Board. The Board has simply taken those fixed prices and enforced them upon the Petitioners and other plumbers who were not participants in the price fixing scheme.

Similarly, in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), private entities, manufacturers and wholesalers, vertically fixed the price for the sale of liquor in California. That price fixing was done without the active supervision of the State's Board of Alcoholic Beverage Control. All that Board did was take those fixed prices

and enforce them upon third parties, *i.e.*, wholesalers of alcoholic beverages who did not comply with the fixed price.

The only difference between this case and *Midcal* is that there the price fixing was done pursuant to legislatively authorized fair trade laws. Nevertheless, the State's failure to actively supervise the anticompetitive conduct negated any immunity claim.

Here, while the existence of an excessive pricing rule may have been foreseeably authorized by the State Legislature in enacting a licensing statute, there is no indication in the enabling legislation that the Board's use of that rule to enforce a fixed price upon its licensees was. Certainly, in any event, as with *Midcal*, there was no active supervision of the private entity price fixing in the first instance.

Just as state action immunity was held not to apply in *Midcal*, so too it should have been held not to apply here. Nevertheless, the Court of Appeals held that the ruling in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 449 U.S. 365 (1991), required the grant of state-action immunity in this case.

Omni is factually and legally distinct from *Midcal* and, therefore, this case as well. It should not have controlled the result here.

In both this case and *Midcal* the anticompetitive conduct originated with private parties. In contrast, in *Omni*, the allegedly anticompetitive conduct, enactment of a zoning ordinance, was by an arm of the state. *Omni* did not change the analysis when anticompetitive conduct originated with private parties.

The Court in *Omni* was very clear to say that its opinion was

not to be deemed an exemption for private anticompetitive conduct which associated itself with the government:

> [The Court's ruling] does not mean, of course, that the States may exempt private action from the scope of the Sherman Act; we in no way qualify the well-established principle that a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.

499 U.S. at 379.

The Court's most recent consideration of the scope of state action immunity, *Federal Trade Commission v. Ticor Title Insurance Company*, 504 U.S. 621 (1992) gives no indication that the Court no longer regarded *Midcal* to be valid.

In *Ticor* the Court reaffirmed its pronouncement in *Midcal*, that for a private entity to receive the benefit of state action immunity, its conduct must not only have been the foreseeable result of the actions of the sovereign, but that conduct must also have been actively supervised by the relevant state agency.

Ticor involved a horizontal price fixing claim brought by the Federal Trade Commission against six title insurance companies who did business throughout the country. Their business in four states was in issue. The defendants contended that they were entitled to state action immunity and thus sought dismissal of the charges. They claimed that their rating bureaus which set the rates were licensed by each of the states, were authorized to set rates, and a mechanism for supervising those rates was in place.

The Court rejected the immunity claim, finding that the

active supervision part of the *Midcal* test had not been satisfied because, in practice, the supervisory mechanisms of the states had not functioned.

In reaching that decision the Court both reviewed and reaffirmed *Midcal:*

> *Midcal* confirms that while a state may not confer antitrust immunity on private persons by fiat, it may displace competition with active supervision if the displacement is both intended by the State and implemented in its specific details. *Actual state involvement, not deference to private price fixing arrangements under the general auspices of the law, is the precondition for immunity from federal law.* Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint. In *Midcal* we found the intent to restrain prices was expressed with sufficient precision so that the first part of the test was met, but that the absence of state participation in the mechanics of the price posting was so apparent that the requirement of active supervision had not been met.

(Emphasis added). 504 U.S. at 633.

While it is clear, certainly, after *Ticor,* that the active supervision standard announced in *Midcal* remains viable, what has not been discussed and what should be considered by this Court is whether the rulings under the facts in *Midcal* also continue as valid precedent. The issue is whether enforcement by a state agency of private unauthorized and unsupervised price fixing against third parties is entitled to state action immunity.

It is an issue which was not considered in *Ticor* because, under the facts in that case, there was no state enforcement of the privately fixed price.

Yet, the Court's pronouncements in *Ticor,* such as that quoted above, reveal a policy whereby courts should not lightly allow a grant of immunity merely because of some involvement by the state with private anticompetitive conduct.

In view of the strong policy standards enunciated in *Ticor,* Petitioners suggest that the decision in *Midcal* on the facts of that case should not have been so readily disposed of through a Judgment Order. Rather, the rulings in *Omni* and in *Midcal* should have been blended.

Petitioners suggest that a view of both cases in light of the policies involved leads to a conclusion that when a state agency acts substantively in producing an anticompetitive policy, it is entitled to the benefits of *Omni,* so long as its conduct was reasonably foreseen by the Legislature. Where, however, the anticompetitive conduct is that of private parties, who are not authorized or supervised by the state in that conduct, state enforcement of that conduct upon third parties does not fit within *Omni's* coverage and no immunity applies.

With such a rule, the principles of *Omni* remain while, at the same time, a state agency is not casting a "gauzy cloak of state involvement over what is essentially a private price fixing arrangement." *Midcal* at page 105.

III.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER A STATE AGENCY IS ENTITLED TO STATE-ACTION IMMUNITY MERELY BECAUSE THE PROCEDURES IT FOLLOWS ARE REASONABLY FORESEEABLE BY THE STATE LEGISLATURE OR WHETHER IMMUNITY SHOULD ALSO DEPEND UPON THE REASONABLE FORESEEABILITY OF THE AGENCY'S SUBSTANTIVE ACTIONS AS WELL.

Critical to any determination that this case is controlled by the principles of *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), is an initial finding that the conduct by the defendant administrative agency is of the type clearly articulated, or, at least, reasonably foreseen by the state legislature. Only then would both the agency, here the Board, and the private parties who act in concert with it, be eligible for immunity.

The courts below merely assumed that the actions of the Board were within the scope of conduct reasonably foreseen by the Legislature. No analysis was performed.

The District Court merely held that a rule against excessive pricing was reasonably foreseen by the Legislature, but never considered whether use of that rule to enforce a fixed price and to bar flat fee pricing was also reasonably foreseen. The Court of Appeals, in its judgment order, explains nothing with regard to the clear articulation/foreseeability issue.

The subject statute, N.J.S.A.45:14C-1, *et seq.*, is a general licensing statute. No particular authority is given by the Legislature to the Board to regulate fees. While, arguably, a rule against excessive pricing may be encompassed within the scope

of a licensing authority, the use or misuse of that rule to impose particular pricing agreements is not.

The facts herein are different from those in *Omni*. There the City of Columbia, in enacting zoning ordinances, acted wholly within the scope of authority given to it by the Legislature. Once the City's actions were found to be authorized, the Court in *Omni* held that the motives for those actions could not be questioned. Here, on the other hand, the issue is whether the Board acted far beyond the scope of any authority given to it by the state. Petitioners are not questioning motive; they are, rather, questioning whether actions were possibly foreseen by the State Legislature.

In *Federal Trade Commission v. Ticor Title Insurance Company*, 504 U.S. 621 (1992), this Court, in viewing the second part of the test first enunciated in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), *i.e.*, whether anticompetitive conduct was actively supervised by the state, considered substance over form. Although state mechanisms were in place to supervise the rate setting activities of the defendants, in reality, they did not function. Thus, the defendants were not entitled to immunity.

Here the Court should also look at substance rather than form. It is the anticompetitive conduct which is the subject of the Sherman Act complaint which should be scrutinized to determine whether it was reasonably foreseen by the Legislature —not the form used to accomplish that conduct.

In *Ticor* this Court, after noting the holding in its prior decisions that "state-action immunity is disfavored," 504 U.S. at 636, emphasized the close relation between *Midcal's* two elements. "Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Id.* at 636.

When the courts below fail to analyze whether a state agency's actual conduct was authorized by the Legislature, but only observe the form through which that conduct occurred, they are defeating the policies enunciated by this Court.

Certiorari, therefore, should be granted to clarify how the lower federal courts should analyze state-action immunity claims -that both elements of the *Midcal* test deserve analyses which look to substance, rather than to form.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 17, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-5249

ANTOINE NASSIMOS; JOSEPH FICHNER, JR.; MICHAEL CONROY; ANTHONY ROSSI; DANIEL W. WELTMAN; GEORGE STEINER; WILLIAM A. MOORE; WILLIAM TEDESCO; MICHAEL IGNOZZI; ALAN HANZO,

Appellants

v.

THE NEW JERSEY BOARD OF EXAMINERS OF MASTER PLUMBERS; NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, INC.; BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS; ROBERT MULLER, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER OF THE NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS; THOMAS BIONDI; ALAN FEID

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and SAROKIN, *Circuit Judges*

Appendix A

SUR PETITION FOR REHEARING IN BANC

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

By the Court,

s/ Jane Roth
Circuit Judge

Dated: JAN 17 1996

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED DECEMBER 18, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5249

ANTOINE NASSIMOS; JOSEPH FICHNER, JR.; MICHAEL CONROY; ANTHONY ROSSI; DANIEL W. WELTMAN; GEORGE STEINER; WILLIAM A. MOORE; WILLIAM TEDESCO; MICHAEL IGNOZZI; ALAN HANZO,

Appellants

v.

THE NEW JERSEY BOARD OF EXAMINERS OF MASTER PLUMBERS; NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS; BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS; ROBERT MULLER, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER OF THE NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS; THOMAS BIONDI; ALAN FEID

Appeal from United States District Court
for the District of New Jersey
(D.C. Civil Action No. 94-cv-01319)
(District Judge: Honorable Mary Little Parell)

Argued on December 11, 1995

Before: BECKER, ROTH and LEWIS, *Circuit Judges*

Appendix B

JUDGMENT ORDER

After consideration of all contentions raised by the parties, we find that the above action is directly controlled by the decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499, U.S. 365 (1991), and

IT IS ADJUDGED AND ORDERED that the judgment of the District Court entered April 4, 1994, be and is hereby affirmed.

Costs to be taxed against appellants.

BY THE COURT,

s/ Jane R. Roth
Circuit Judge

Attest:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

Dated: DEC 18 1995

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MARCH 31, 1995

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 94-1319 (MLP)

ANTOINE NASSIMOS, *et al.*,

Plaintiffs,

v.

BOARD OF EXAMINERS OF MASTER PLUMBERS, THOMAS BIONDI,

Defendants.

MEMORANDUM AND ORDER

PARELL, District Judge

This matter is before the Court on motion for summary judgment by defendants New Jersey Board of Examiners of Master Plumbers, Thomas Biondi, Alan Feid and Robert Muller, on motion to dismiss by defendants New Jersey Association of Plumbing-Heating-Cooling Contractors, Inc. and Bayshore Association of Plumbing, Heating and Cooling Contractors, and on application by plaintiffs for a preliminary injunction. For the following reasons, defendants' motions are granted and plaintiffs' application is denied.

Appendix C

BACKGROUND

Plaintiffs here are master plumbers who are licensed by the New Jersey Board of Examiners of Master Plumbers (the "Board"), a licensing agency for the State of New Jersey, and who conduct business in the state of New Jersey.[1] Plaintiffs allege that defendants[2] conspired to fix prices in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.[3] Plaintiffs assert that the Board, in conspiracy with the other defendants, has enforced N.J.A.C. § 13:32-1.12, which prohibits a licensee of the Board from charging "an excessive price for services," in

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1. Two of the named plaintiffs are not licensed master plumbers but rather allege that they are currently in the process of obtaining such licensure. The Court notes that these two plaintiffs may not have standing to assert the claims in this action; however, since the issue of standing has not been raised by any of the defendants and since the issue is not material to the resolution of this litigation, the Court does not address it.

2. Defendants here are the New Jersey Board of Examiners of Master Plumbers (the "Board"), the New Jersey Association of Plumbing-Heating-Cooling Contractors, Inc. ("NJAPHCC"), the Bayshore Association of Plumbing, Heating and Cooling Contractors ("Bayshore"), Thomas Biondi, Alan Feid and Robert Muller.

NJAPHCC and Bayshore are both trade associations. Thomas Biondi and Alan Feid are individuals who have both served as the Chairman of the New Jersey Board of Examiners of Master Plumbers. Robert Muller is an individual who has served as an officer of NJAPHCC and who testified on behalf of the State at a disciplinary hearing against plaintiff Joseph Fichner.

3. Section 1 of the Sherman Antitrust Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" is illegal. 15 U.S.C. § 1.

a manner which effectively fixes the prices which may be charged by master plumbers for their services.

N.J.A.C. § 13:32-1.12 provides:

> (a) A licensee of the Board of Examiners of Master Plumbers shall not charge an excessive price for services. A price is excessive when, after review of the facts, a licensee of ordinary prudence would be left with a definite and firm conviction that the price is so high as to be manifestly unconscionable or overreaching under the circumstances.
>
> (b) Factors which may be considered in determining whether a price is excessive include, but are not limited to, the following:
>
> 1. The time effort required;
>
> 2. The novelty or difficulty of the job;
>
> 3. The skill required to perform the job properly;
>
> 4. Any special conditions placed upon the performance of the job by the person or entity for which the work is being performed;
>
> 5. The experience, reputation and

ability of the licensee to perform the services; and

6. The price customarily charged in the locality for similar services.

(c) Charging an excessive price shall constitute occupational misconduct within the meaning of N.J.S.A. 45:1-21(e) and may subject the licensee to disciplinary action.

N.J.A.C. § 13:32-1.12.

Specifically, in Count One of the Amended Complaint, plaintiffs allege that the Board has accepted and enforced, as "the price customarily charged in the locality for similar services," the price established by defendants and members of the defendant trade associations. (*See* Am. Compl. at 4-6.) Plaintiffs further allege that they have been forced to charge the fixed prices in order to avoid disciplinary action under N.J.A.C. § 13:32-1.12(c).

The claim of price fixing set forth in Count Two is premised on allegations related to a disciplinary proceeding previously instituted by the Attorney General for the State of New Jersey against plaintiff Joseph Fichner. (*See* Am. Compl. at 6-8.) This Court is familiar with this disciplinary proceeding.[4]

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4. On October 6, 1993, Joseph Fichner filed a complaint with this Court, *Fichner v. Board of Examiners of Master Plumbers*, Civil Action No. 93-4597 (MLP), challenging the constitutionality of N.J.A.C. § 13:32-1.12, which is the (Cont'd)

Appendix C

Based on consumer complaints, the Attorney General for the State of New Jersey filed a disciplinary complaint with the Board on July 30, 1992,[5] alleging that, in seven different consumer transactions for plumbing services between October 6, 1988 and July 2, 1991, Joseph Fichner charged prices which exceeded the usual and customary charges for such work. Hearings were held on the complaint on December 17, 1992, January 14, 1993, February 9, 1993, March 16, 1993 and April 28, 1993. Defendant Thomas Biondi was Chairman of the Board on these dates and presided over the hearings. Defendant Robert Muller testified on behalf of the State as to usual and customary prices charged by plumbers in the relevant locality. Mr. Fichner presented the testimony of Richard DiToma on the issue of pricing. By Final Decision and Order filed August 20, 1993, the Board determined that Fichner had "engaged in unconscionable overpricing of plumbing work performed for seven consumers by charging six consumers more than double the usual and customary rate for such services, and charging the seventh approximately $200.00 in excess of the usual and customary rate." (Ex. B. attached to Compl. filed in Civil Action No. 93-4597 (MLP).)

(Cont'd)
same rule challenged by plaintiffs in the instant action, as this rule was applied against Fichner in the disciplinary proceeding. By Memorandum and Order dated September 27, 1994, this Court granted the defendants' motion to abstain in *Fichner v. Board of Examiners of Master Plumbers*, Civ. Action No. 93-4597 (MLP).

5. This was apparently the second disciplinary complaint filed against Joseph Fichner. A previous complaint had been filed in 1988 which resulted in a reprimand and an order to pay restitution.

Appendix C

DISCUSSION

I. *Motion for Summary Judgment*

The Board, Thomas Biondi, Alan Feid and Robert Muller move for summary judgment on the basis that these defendants are state actors and thus fall within the "state-action exemption" to the federal antitrust laws.

A court shall enter summary judgment under Federal Rule of Civil Procedure 56(c) when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In order to defeat a motion for summary judgment, the opposing party must establish that a genuine issue of material fact exists. *Jersey Cent. Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1109 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986). A nonmoving party may not rely on mere allegations; it must present actual evidence that creates a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (citing *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)); *Schoch v. First Fidelity Bankcorporation*, 912 F.2d 654, 657 (3d Cir. 1990). Issues of fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. Moreover, "allegations of restraint of trade must be supported by 'significant probative evidence' to overcome a motion for summary judgment." *Bushie v. Stenocord Corp.*, 460 F.2d 116, 120 (9th Cir. 1972) (quoting *First National Bank v. Cities Service, Inc.*, 391 U.S. 253 (1968)).

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The Supreme Court held in *Parker v. Brown*, 317 U.S. 341 (1943) that the Sherman Act was not intended to apply to certain types of governmental action by the states. Thus, the *Parker* court first established the well-settled "state-action exemption" to the federal antitrust laws. The exercise of traditional regulatory functions by the states, including regulation of the practice of licensed professions, e.g., medicine, law, accounting, engineering, architecture, plumbing, etc., is governmental action which qualifies as a "state-action exemption" to the federal antitrust laws. *See Bates v. Arizona State Bar*, 433 U.S. 350, 359-63 and 360 n.11 (1977) (state authority to regulate licensed professions should not be diminished by application of the Sherman Act); *California State Bd. of Optometry v. F.T.C.*, 910 F.2d 976, 982 (D.C. Cir. 1990); *Healey v. Bendick*, 628 F. Supp. 681, 689 (D.R.I. 1986).

Where an entity is designated to serve as the state's administrative adjunct for purposes of regulating a licensed profession, the entity is considered a state agency for purposes of the "state-action exemption" to the federal antitrust laws. *Brazil v. Arkansas Bd. of Dental Examiners*, 593 F. Supp. 1354, 1362-63 (E.D. Ark. 1984), *aff'd*, 759 F.2d 674 (8th Cir. 1985) (citing *Gambrel v. Kentucky Board of Dentistry*, 689 F.2d 612, 618 n.2 (6th Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983)). A state agency is presumed to act in the public interest and, in order to come within the "state action exemption," it need only establish that its action is taken pursuant to a clearly articulated and affirmatively expressed state policy. *See Hallie v. Eau Claire*, 471 U.S. 34, 45-47 (1985); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985).

In 1968, the New Jersey Legislature enacted the State Plumbing License law, N.J. Stat. Ann. § 45:14C-1, *et seq.*, which

provides the Board with broad supervisory powers over the practice of plumbing. In order to carry out the responsibilities inherent in this broad vest of supervisory power, the Board is authorized to "adopt, amend and promulgate such rules and regulations which may be necessary to carry out the provisions of [this Act]." N.J. Stat. Ann. § 45:14C-7. The purpose of N.J.A.C. § 13:32-1.12, the rule promulgated by the Board and challenged by plaintiffs, is to protect consumers from being charged unconscionable prices by licensed plumbers and is reflective of the clearly articulated and affirmatively expressed state policy aimed at preventing such wrongful activity by licensed professionals. *See New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 N.J. 544, 565-66 (1978); *see also American Trial Lawyers Assoc. v. New Jersey Supreme Court*, 66 N.J. 258, 265 (1974); *see generally Kugler v. Romain*, 58 N.J. 522 (1971). Thus, in enforcing the requirement that licensed master plumbers not charge excessive prices, the Board is acting pursuant to a clearly articulated and affirmatively expressed state policy.

Accordingly, it is clear that the Board, Thomas Biondi, Alan Feid and Robert Muller,[6] should be exempt from this suit which is based on an alleged violation of the Sherman Act, and the motion for summary judgment by these defendants shall be

---

6. Defendants Thomas Biondi and Alan Feid are defendants here on the basis that they have both served as Chairman of the New Jersey Board of Examiners of Master Plumbers. Thus, these defendants are sued here only in their capacity as state officials. Robert Muller is a defendant here on the basis that he testified on behalf of the State at the hearings held on the disciplinary complaint filed against plaintiff Joseph Fichner. Thus, for purposes of the "state-action exemption" analysis here, defendant Muller was a state actor when he provided testimony at the request of the State.

granted on this basis. *See Bates v. Arizona State Bar*, 433 U.S. at 361-63.

II. *Motion to Dismiss*

Defendant trade associations, NJAPHCC and Bayshore, move to dismiss plaintiffs' complaint against them. A court may dismiss a complaint pursuant to Rule 12(b)(6) "only if, accepting all well pleaded facts as true, the plaintiff is not entitled to relief." *Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986). Additionally, all reasonable inferences from plaintiff's allegations "must be accepted as true and viewed in the light most favorable to the non-moving party." *Sturm v. Clark*, 835 F.2d 1009, 1011 (3d Cir. 1987). This Court may not dismiss a complaint unless plaintiff can prove no set of facts which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

The crux of plaintiffs' complaint is that the Board, in conspiracy with the defendant trade associations, Biondi, Feid and Muller, has enforced N.J.A.C. § 13:32-1.12 in such a manner as to effectively force plumbers to charge a fixed price for services. The assertion that the rule prohibiting master plumbers from charging excessive and unconscionable prices results in a situation where only "fixed prices" can be charged for plumbing services in order to avoid the threat of disciplinary action by the Board is without merit. There is simply no support for plaintiffs' assertion that the Board's enforcement of the requirement that plumbers not charge unconscionably excessive prices has effectively "fixed" the price which a licensed plumber may charge for plumbing services. Indeed, evidence of the price

customarily charged in the locality for similar services is only on of six factors which may be considered in determining whether a price charged is excessive within the meaning of the rule. Plaintiffs' theory of a conspiracy to fix prices rests on the allegation that the Board is wrongfully enforcing N.J.A.C. § 13:32-1.12 and since this allegation is without merit, plaintiffs' assertion of an antitrust violation fails as to defendants NJAPHCC and Bayshore as well. Accordingly, the motion to dismiss by defendants NJAPHCC and Bayshore shall be granted.[7]

IT IS therefore on this 31st day of March, 1995, **ORDERED** that the motion for summary judgment by defendants New Jersey Board of Examiners of Master Plumbers, Thomas Biondi, Alan Feid and Robert Muller is hereby **GRANTED**;

IT IS FURTHER ORDERED that the motion to dismiss by defendants New Jersey Association of Plumbing-Heating-Cooling Contractors, Inc. and Bayshore Association of Plumbing, Heating and Cooling Contractors is hereby **GRANTED**; and

---

7. Plaintiffs have applied to the Court for a preliminary injunction (a) prohibiting the Board from relying upon information provided by the defendant trade associations in determining the reasonableness of fees and (b) prohibiting the Board from enforcing the judgment issued against plaintiff Joseph Fichner. Since this Court herein has resolved the issue set forth in plaintiffs' complaint in favor of defendants, there is no basis upon which to grant plaintiffs' request for injunctive relief. *See Opticians Ass'n of America v. Independent Opticians of America*, 920 F.2d 187, 191-92 (3d Cir. 1990); *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 197-98 (3d Cir. 1990); *In re Arthur Treacher's Franchise Litigation*, 689 F.2d 1137, 1143 (3d Cir. 1982). Accordingly, the application for a preliminary injunction shall be denied.

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IT IS FURTHER ORDERED that the application by plaintiffs for a preliminary injunction is hereby **DENIED**.

s/ Mary Little Parell
MARY LITTLE PARELL
United States District Judge

APPENDIX D — RELEVANT PORTIONS OF NEW JERSEY STATE PLUMBING LICENSE LAW — N.J.S.A. 45:14C-3, 7, 12.3

N.J.S.A. 45:14C-3

45:14C-3. State board of examiners of master plumbers; membership; terms; removal

There is created hereunder a State Board of Examiners of Master Plumbers in the Department of Law and Public Safety, consisting of 7 citizens to be appointed by the Governor, without regard to political affiliation, and except as to members first appointed for terms of 4 years and until the appointment of their successors. Of the members first appointed 2 shall be appointed for terms of 1 year, 2 for 2 years, 2 for 3 years and one for 4 years. Three members shall be master plumbers of at least 10 years experience, one shall be a local plumbing inspector who has held such appointment for at least 10 years, one shall be a journeyman plumber of at least 10 years experience and 2 shall be representatives of the public having no association with the plumbing industry.

No member shall be eligible for appointment for more than 2 terms. Appointments to fill vacancies on the board shall be made for the remainder of the unexpired term.

Members of the board shall be subject to removal by the Governor for cause.

N.J.S.A. 45:14C-7

45:14C-7. Rules and regulations

The State board may adopt, amend and promulgate such rules and regulations which may be necessary to carry out the

provisions of this act; provided, however, that the board's jurisdiction shall not include the regulation or determination of matters relating to trade or craft jurisdiction or the determination of whether any particular class of employee is entitled to perform any particular work.

N.J.S.A. 45:14C-12.3

45:14C-12.3. Master plumbers; licenses required under L.1987, c. 442; additional penalty

a. On or after the effective date of this 1987 amendatory and supplementary act, a person shall not work as a master plumber or use the title or designation of master plumber unless licensed pursuant to the provisions of this amendatory and supplementary act.

b. On or after the effective date of this 1987 amendatory and supplementary act, a person, firm, partnership, corporation or other legal entity shall not engage in the business of plumbing contracting or advertise in any manner as a plumbing contractor or use the title or designation of plumbing contractor unless authorized to act as a plumbing contractor pursuant to the provisions of this amendatory and supplementary act. In addition to any penalty authorized pursuant to the provisions of section 12 of P.L. 1978, c. 73 (C.45:1-25), any person, firm, partnership, corporation or other legal entity which violates nay provision of this subsection shall be guilty of a disorderly persons offense.

APPENDIX E — AMENDED COMPLAINT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MAY 27, 1994

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL CASE NO.

ANTOINE NASSIMOS, JOSEPH FICHNER, JR., MICHAEL CONROY, ANTHONY ROSSI, DANIEL W. WELTMAN, GEORGE STEINER, WILLIAM A. MOORE, WILLIAM TEDESCO, MICHAEL IGNOZZI and ALAN HANZO,

Plaintiffs,

vs.

THE NEW JERSEY BOARD OF EXAMINERS OF MASTER PLUMBERS; NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, INC.; BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS; and ROBERT MULLER, individually and in his capacity as an officer of the NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND

Appendix E

COOLING CONTRACTORS, THOMAS BIONDI and ALAN FEID,

Defendants.

AMENDED COMPLAINT

Plaintiffs, by way of Amended Complaint against the defendants, state as follows:

JURISDICTION AND VENUE

1. This Complaint is brought pursuant to the antitrust laws of the United States, specifically 15 U.S.C. 1, commonly known as the Sherman Act. This Court has jurisdiction over this matter pursuant to 15 U.S.C. 15.

The plaintiffs and defendants all conduct business in this district.

THE PARTIES

1. The majority of the plaintiffs are currently master plumbers who are licensed by the State of New Jersey and conduct their business in this State. Two of the plaintiffs are in the process of obtaining such licensure.

2. Defendant, NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS OF NEW JERSEY (hereinafter referred to as "NJAPHCC"), is a trade association whose membership includes various master plumbers who are licensed by the State of New Jersey and conduct their business in the State of New Jersey. Membership in the NJAPHCC also includes heating and cooling contractors.

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3. Defendant, BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS (hereinafter referred to as "BAYSHORE"), is a trade association whose membership includes various master plumbers and plumbing contractors who do business in Monmouth and Middlesex Counties of New Jersey. It is affiliated with the NJAPHCC.

4. Defendant, ROBERT MULLER (hereinafter referred to as "MULLER"), is a master plumber licensed by the State of New Jersey whose business is located in the Borough of Matawan, County of Monmouth and State of New Jersey. MULLER has been an officer of the NJAPHCC during time periods relevant to this matter.

5. Defendant, BOARD OF EXAMINERS OF MASTER PLUMBERS (hereinafter referred to as the "BOARD"), is an administrative body within the Division of Consumer Affairs of the Department of Law and public Safety of the State of New Jersey. It was created pursuant to N.J.S.A. 45:14C-1, *et seq*.

6. Defendant, THOMAS-BIONDI (hereinafter referred to as "BIONDI"), during the time period relevant to this complaint, has served as Chairman of the Board. He has also been an active member of the NJAPHCC.

7. Defendant, ALAN FEID (hereinafter referred to as "FEID"), during the time period relevant to this complaint, has served as Chairman of the Board. He has also been an active member of the NJAPHCC.

Appendix E

TRADE AND COMMERCE

This matter involves a claim of price fixing by master plumbers operating in the State of New Jersey. Such master plumbers use or install equipment, parts and supplies which are in interstate trade or commerce. The price fixing conspiracy as alleged has had a substantial effect on such trade or commerce.

OFFENSES CHARGED

COUNT I

1. Defendant, NJAPHCC and several of its affiliated local organizations, including, without limitation, defendant, BAYSHORE, have, for several years, conducted frequent meetings of their members. Among the subjects discussed at such meetings were the prices charged and to be charged to consumers by the associations' members.

2. The purpose and effect of such discussions has been to establish, stabilize, or otherwise fix the prices to be charged by competitor members of the associations to consumers.

3. Such discussions in order to establish, stabilize or otherwise fix prices between competitors constitutes a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

4. The majority of the plaintiffs are not members of the NJAPHCC or of any of its affiliated associations and have not participated in the aforesaid price fixing scheme. Two of the plaintiffs are members of the NJAPHCC but have not participated in the price fixing scheme. Ordinarily, thus, each

plaintiff would be free to charge for his services as he determined in his individual discretion.

5. The plaintiffs, nevertheless, have been and are being forced to charge rates as established by the NJAPHCC and its affiliated local organizations by virtue of a Rule established by the BOARD and the actions of the BOARD's members, in particular BIONDI and FEID, in enforcing that Rule.

6. The Rule in question is N.J.A.C. 13:32-1.12, a copy of which is attached hereto as Exhibit "A". That Rule prohibits a licensee of the BOARD from charging excessive prices for his services, with the threat of a charge of occupational misconduct within the meaning of N.J.S.A. 45:1-21(e), should a Rule violation be found. Among the criteria to be followed in determining whether a price charged is excessive is "the price customarily charged in the locality for similar services." N.J.A.C. 13:32-1.12(b)6.

7. The BOARD has accepted and enforced as "the price customarily charged in the locality for similar services" the price as established a aforesaid by members of the NJAPHCC and its local affiliates.

8. Defendants, BIONDI and FEID have used their positions as Chairmen of the Board and active members of the NJAPHCC to have the BOARD use its pricing rule to enforce the fixed price established by the NJAPHCC.

9. The plaintiff master plumbers subject to the BOARD's jurisdiction, have been coerced, under threat to their respective licenses, to adhere to the prices as established by the NJAPHCC

members and those of their local affiliates. As is more specifically referenced in Count II, one plaintiff herein has been severely punished by the BOARD for failing to adhere to the established prices.

10. There is no requirement under the laws of the State of New Jersey which clearly articulates that prices to be charged to consumers by master plumbers are to be set at established rates.

11. The establishment of rates to be charged by master plumbers is not actively supervised by any agency of the State of New Jersey, including the BOARD. The BOARD merely adopts and enforces, without supervision, the rates as established by the NJAPHCC and its local affiliates.

11. Such conduct and procedures constitute a conspiracy in restraint of trade or commerce in violation of 15 U.S.C. 1. The plaintiffs have been and are being damaged in their business or property as a result.

WHEREFORE, plaintiffs demand that this Court enter judgment as follows:

A. Enjoining defendants, NJAPHCC; BAYSHORE, BIONDI and FEID from, directly or indirectly, participating in, encouraging, or facilitating any conduct whereby the prices to be charged by master plumbers are established, stabilized or fixed.

B. Enjoining the BOARD from enforcing N.J.A.C. 13:32-1.12 so long as the method for determining what constitutes excessive plumbing prices are based on rates which are illegally and improperly established, stabilized or fixed.

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C. Awarding the plaintiffs their costs of suit, including reasonable attorneys' fees pursuant to 15 U.S.C. 15(a).

D. Awarding plaintiffs such other and further relief as the Court deems appropriate and in the interest of justice.

COUNT II

1. Plaintiffs repeat and reallege the allegations contained in Count I and make them a part hereof as though more fully set forth at length herein.

2. Plaintiff, JOSEPH FICHNER, JR. (hereinafter referred to as "FICHNER") was heavily fined and otherwise severely punished by the BOARD as a result of his failure to follow the rates as established by members of the NJAPHCC and BAYSHORE at their respective meetings.

3. Defendant, MULLER has testified in hearings against FICHNER both as to his participation at NJAPHCC and BAYSHORE meetings in discussions to establish, stabilize and fix rates and as to what those established, stabilized and fixed rates are.

4. MULLER, thus, both conspired to establish, stabilize and fix the prices to be charged by NJAPHCC and BAYSHORE members, and assisted in applying those set rates to FICHNER through communication to the BOARD.

5. The BOARD thereupon applied the set rates to FICHNER and severely punished him for failing to charge those rates. The BOARD used N.J.A.C. 13:32-1.12 as the purported basis for its complaint against FICHNER.

6. The BOARD's enforcement of the rates as communicated by MULLER had the effect of establishing those rates as the only appropriate rates to be charged by all licensed master plumbers in FICHNER's "locality". Thus, not only FICHNER, but all master plumbers in FICHNER's "locality" have been and are being damaged in their business or property as a result of the aforesaid conduct.

WHEREFORE, plaintiffs demand that this Court enter judgment as follows:

A. Enjoining defendants, NJAPHCC, BAYSHORE, BIONDI and FEID from, directly or indirectly, participating in, encouraging, or facilitating any conduct whereby the prices to be charged by master plumbers or established, stabilized or fixed.

B. Enjoining the BOARD from enforcing N.J.A.C. 13:32-1.12 so long as the method for determining what constitutes excessive plumbing prices is based on rates which are illegally and improperly established, stabilized or fixed.

C. Enjoining MULLER from directly or indirectly participating in conduct to establish, stabilize or fix prices as set forth above.

D. Awarding FICHNER threefold the damage he has incurred as a result of the defendants' conduct.

E. Awarding the plaintiffs their costs of suit, including reasonable attorneys' fees pursuant to 15 U.S.C. 15(a).

F. Awarding plaintiffs such other and further relief as the Court deems appropriate and in the interest of justice.

Appendix E

EVANS, OSBORNE, KREIZMAN AND BONNEY
Attorneys for Plaintiffs

BY: s/ Joel N. Kreizman
JOEL N. KREIZMAN JNK 9421

DATED: May 26, 1994

Appendix E

ATTACHMENT A

N.J.A.C. 13:32-1.12

13:32-1.12. Professional prices

(a) A licensee of the Board of Examiners of Master Plumbers shall not charge an excessive price for services. A price is excessive when, after review of the facts, a licensee of ordinary prudence would be left with a definite and firm conviction that the price is so high as to be manifestly unconscionable or overreaching under the circumstances.

(b) Factors which may be considered in determining whether a price is excessive include, but are not limited to, the following:

1. The time and effort required;

2. The novelty or difficulty of the job;

3. The skill required to perform the job properly;

4. Any special conditions placed upon the performance of the job by the person or entity for which the work is being performed;

5. The experience, reputation and ability of the licensee to perform the services; and

6. The price customarily charged in the locality for similar services.

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(c) Charging an excessive price shall constitute occupational misconduct within the meaning of N.J.S.A. 45:1-21(e) and may subject the licensee to disciplinary action.

(2)
Supreme Court, U.S.
FILED
MAY 10 1996
CLERK

No. 95-1630

In The

Supreme Court of the United States

October Term, 1995

ANTOINE NASSIMOS, JOSEPH FICHNER, JR., MICHAEL CONROY, ANTHONY ROSSI, DANIEL W. WELTMAN, GEORGE STEINER, WILLIAM A. MOORE, WILLIAM TEDESCO, MICHAEL IGNOZZI and ALAN HANZO,

Petitioners,

v.

THE NEW JERSEY BOARD OF EXAMINERS OF MASTER PLUMBERS, NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, INC., BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS and ROBERT MULLER, individually and in his capacity as an officer of the NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, THOMAS BIONDI and ALAN FEID,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OPPOSING PETITION FOR CERTIORARI ON BEHALF OF STATE RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Is there even colorably an agreement to restrain trade in violation of the Sherman Act with respect to an administrative agency rule prohibiting licensed plumbers from charging unconscionably excessive prices when that regulatory prohibition is grounded in long-standing State law that forbids unconscionable commercial practices on a legal standard defining "unconscionability" not as the failure to adhere to a specified price or price range, but as imposing on the consumer a price burden at odds with the common understanding of the ordinary and untrained member of the public?

2. On the assumption that the Sherman Act is even implicated at all, is the administrative agency rule in question exempt from Sherman Act scrutiny under the State action immunity doctrine given that the State through its legislative decision to license those persons engaging in the plumbing trade has thereby declared its intention to displace the competition of the free market with regulatory controls?

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STATEMENT OF THE CASE

The administrative agency rule prohibiting licensed master plumbers in New Jersey from exacting excessively, unconscionably high prices from consumers does not concern price-fixing. It is grounded instead in long-established New Jersey legal doctrine, *see, e.g., Henningsen v. Bloomfield Motors, Inc.*, 32 *N.J.* 358, 161 *A.* 2d 69 (1960), that a vendor of goods and services such as a licensed plumber, while enjoying broad latitude to charge prices which he or she thinks appropriate, may not so far exceed the bounds of reasonableness as to impose upon the consumer a burden which is at odds with the common understanding of the ordinary and untrained member of the public. Pricing conscionability or unconscionability under the rule is determined by a broad number of circumstances, including not only the price customarily charged in the particular locality for similar services, but also, for example, the time and effort required, the novelty or difficulty of the job and the skill required to perform the job properly (Pa27). *N.J.A.C.* 13:32-1.12(b). In the only two disciplinary cases, both involving the same licensee, of which these petitioners complain, the licensing board imposed regulatory discipline because he exceeded by a wide margin a price which under these standards any reasonable person could characterize as conscionable. The rule has been promulgated and implemented in furtherance of the administrative agency's statutory obligation to protect the consuming public through the licensing and disciplinary processes, and thus not only is it not the vehicle for a "conspiracy" under the Sherman Act, but it is exempted

from Sherman Act scrutiny under the State action immunity doctrine as well.

The petitioners are ten individuals, eight of whom are licensed master plumbers and two of whom are seeking licensure, while the respondents are the New Jersey Board of Examiners of Master Plumbers, two Board members, two private plumbing trade associations and one licensed master plumber who had testified as a State expert witness in the two disciplinary proceedings mentioned above. The conclusory allegation being one of "price fixing by master plumbers operating in the State of New Jersey" (Pa21), the amended complaint more specifically alleged that the trade associations for several years had conducted frequent meetings at which were discussed the prices charged and to be charged consumers by association members (Pa21). Assertedly, the purpose and effect of those discussions had been to establish, stabilize or otherwise fix the prices to be charged in violation of Section 1 of the Sherman Act (Pa21).

Ordinarily, the complaint stated, each petitioner would be free to charge for his services as he would determine in his individual discretion (Pa21, 22), but the petitioners allegedly were being "forced" to charge rates as established by the associations by virtue of the Board rule and the actions of the Board members in enforcing that rule (Pa22). As the complaint states, "[a]mong the criteria to be followed" in determining whether a price charged is excessive is, in the language of the rule, "the price customarily charged in the locality for similar services" (Pa22). The Board, allegedly, had accepted and enforced as that price the price established by members of the associations (Pa22), with the petitioners being

"coerced" by virtue of the Board's disciplinary authority to adhere to those prices (Pa22, 23). The two named Board members allegedly had used their positions as Board chairmen and as active association members to have the Board use its pricing rule to enforce the fixed price supposedly established by the association (Pa22).

According to the complaint, one licensee, Joseph Fichner, had been "severely punished" by the Board for "failing to adhere to the established prices" (Pa23). The State expert witness, Robert Muller, had testified in hearings against Fichner as to, allegedly, Muller's participation at association meetings in discussions to establish, stabilize and fix rates and as to what those rates were (Pa24), and thus Mr. Muller, assertedly, both conspired to establish, stabilize and fix the prices to be charged by association members and "assisted in applying" those "set rates" to Fichner through "communication" to the Board (Pa24). According to the complaint, the Board's enforcement of the rates as "communicated" by Mr. Muller "had the effect" of establishing those rates "as the only appropriate rates" to be charged by all licensed master plumbers in Fichner's locality (Pa25).[1]

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[1] The complaint having so stressed the disciplinary cases against Joseph Fichner, some brief information concerning those cases is in order. As proved in the first disciplinary proceeding, Fichner had billed and received, for example, $650 for six hours of labor in unclogging a drain when the price would ordinarily have been approximately $320. Another consumer was charged $180 for work to repair a toilet that would reasonably have cost only approximately $45. In the second disciplinary case, Fichner was proved to have billed $265 to "rebuild" a toilet when the usual and customary price would have been $109. He charged $425 to clear a sewer line when the appropriate cost would have been approximately $239.

Mr. Muller acknowledged during his testimony in the disciplinary cases that plumbers typically are very social animals who like to talk and exchange ideas at association functions, including ideas regarding pricing. As Mr. Muller stated in an affidavit submitted in the present litigation, prices were spoken of on a regular basis at the meetings, but only with respect to

> factors which should be considered by a member in formulating a price or price range for the services and products which he offers to the general public. These discussions have also included how members should comply with rules applicable to our fields, such as N.J.A.C. 13:32-1.12. These discussions have not involved any attempt to prescribe or establish prices or price ranges which must or should be charged by members to the general public. These discussions inevitably occurred after the monthly meetings of Bayshore.[2] [Ja22,23]

When the Appellate Division of the New Jersey Superior Court affirmed the first disciplinary order against Fichner, it noted that the discipline imposed was based upon "the strong public policy of this State in favor of consumer protection" (Ja78). The second disciplinary order was reversed and remanded because of questions pertaining to Board member appointment qualifications, but the Appellate Division remarked upon "what [the Board] understandably considered to be [Fichner's] egregious conduct in continuing to engage in unconscionable commercial practices" (Ja227). The further appeal of the second disciplinary case is now pending before the New Jersey Supreme Court.

[2] The "Bayshore" reference is to one of the private trade association defendants, Bayshore Association of Plumbing, Heating and Cooling Contractors.

It was by speaking to various plumbers in this way that he had compiled for his testimony information depicting the general prevailing wage. On this basis, for the first proceeding he had found a range of customary prices between a low price of approximately $35 per hour and a high price of approximately $55 per hour before comparing Fichner's prices to this range. See n., p. 3, *supra*. For the second proceeding he had found the highest price to be approximately $65 and the lowest to be approximately $45 to $50, the average price therefore being struck at $55. Here again, Mr. Muller then compared this price range to Fichner's prices. See n., p. 3, *supra*.

In her memorandum and order of March 31, 1995 the District Judge, The Honorable Mary Little Parell, noted the well-settled State action exemption to the federal antitrust laws (Pa11).

> The exercise of traditional regulatory functions by the state, including regulation of the practice of licensed professions, e.g., medicine, law, accounting, engineering, architecture, plumbing, etc., is governmental action which qualifies as a "state-action exemption" to the federal antitrust laws. [Citations omitted]
>
> Where an entity is designated to serve as the state's administrative adjunct for purposes of regulating a licensed profession, the entity is considered a state agency for purposes of the "state-action exemption" to the federal antitrust laws. [Citations omitted] A state agency is presumed to act in the public interest and, in order to come within the "state action exemption," it need only establish that its action is taken pursuant to a clearly articulated and affirmatively expressed state policy. [Citations omitted] [Pa11]

The Board of Examiners of Master Plumbers, legislatively created with broad supervisory power over the practice of plumbing, had adopted its excessive pricing rule to protect consumers from being charged unconscionable prices by licensed plumbers (Pa12). The rule

> is reflective of the clearly articulated and affirmatively expressed state policy aimed at preventing such wrongful activity by licensed professionals. [Citations omitted] Thus, in enforcing the requirement that licensed master plumbers not charge excessive prices, the Board is acting pursuant to a clearly articulated and affirmatively expressed state policy. [Pa12]

The District Court therefore granted summary judgment for the State defendants (Pa12, 13). With respect to the private defendants as well as the State defendants, the judge noted:

> The assertion that the rule prohibiting master plumbers from charging excessive and unconscionable prices results in a situation where only "fixed prices" can be charged for plumbing services in order to avoid the threat of disciplinary action by the Board is without merit. There is simply no support for plaintiffs' assertion that the Board's enforcement of the requirement that plumbers not charge unconscionably excessive prices has effectively "fixed" the price which a licensed plumber may charge for plumbing services. Indeed, evidence of the price customarily charged in the locality for similar services is only one of six factors which may be considered in determining whether a price charged is excessive within the meaning of the rule. Plaintiffs' theory of a conspiracy to fix prices rests on the

> allegation that the Board is wrongfully enforcing N.J.A.C. § 13:32-1.12 and since this allegation is without merit, plaintiffs' assertion of an antitrust violation fails as to defendants NJAPHCC[3] and Bayshore as well. [Pa13,14]

The District Court accordingly granted dismissal favoring the private defendants as well (Pa14).

On December 18, 1995 the United States Court of Appeals for the Third Circuit affirmed the District Court judgment (Pa3) and on January 17, 1996 denied the petition for rehearing (Pa1).

SUMMARY OF ARGUMENT

The administrative rule of the New Jersey Board of Examiners of Master Plumbers which prohibits its licensees from exacting from consumers unconscionably excessive prices for plumbing services is totally unrelated to price-fixing as prohibited by the Sherman Act. The price unconscionability rule prohibition is grounded, rather, in New Jersey judge-made and statutory law of long standing which prohibits unconscionable commercial practices in a broad variety of contexts on a legal standard defining "unconscionability" not as the failure to adhere to a specified price or price range, but as imposing on the consumer a price burden which is at odds with the common understanding of the ordinary and untrained member of the public. The Board was

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[3] The "NJAPHCC" reference is to another of the trade association defendants, the New Jersey Association of Plumbing-Heating-Cooling Contractors, Inc.

legislatively created to protect the consuming public, and given its broad authority in that regard, including rulemaking authority, it was entirely foreseeable that the Board would have exercised its rulemaking power to deter pricing unconscionability. Indeed, it was the Board, not any private group or association, that took the initiative in enforcing the rule against one particular licensee who had violated the rule with respect to a number of consumers. The rule and its enforcement therefore most certainly do not constitute an agreement to fix prices in violation of the Sherman Act.

While the Sherman Act in this sense is not implicated at all, it is nonetheless true that the New Jersey legislative decision to license those persons who engage in the plumbing trade is an act by which the State has unambiguously declared its intention to displace the competition of the free market with regulatory controls. The New Jersey Legislature could have decided to let the competitive market distinguish through malpractice and ensuing injuries between the competent and the incompetent, but by rejecting that approach in favor of governmental regulation, the Legislature has established a statutory and administrative system which undeniably replaces entirely free competition with a form of State-mandated control. The legislative scheme thus falls squarely within the State action exemption to the Sherman Act. The conclusion reached by both the District Court and the Court of Appeals that State action immunity does apply here was thus entirely correct and in no way conflicts with precedents of this Court. Therefore the petition for *certiorari* should be denied.

ARGUMENT

THE BOARD OF EXAMINERS OF MASTER PLUMBERS RULE PROHIBITING LICENSEES FROM EXACTING FROM CONSUMERS UNCONSCIONABLY EXCESSIVE PRICES IS ROOTED IN LONG-STANDING NEW JERSEY LAW CONDEMNING UNCONSCIONABLE COMMERCIAL PRACTICES. THE RULE AND ITS IMPLEMENTATION THUS HAVE NOTHING WHATEVER TO DO WITH "PRICE-FIXING" AS PROHIBITED BY THE SHERMAN ACT. IN ANY EVENT, THE RULE IS THE FORESEEABLE RESULT OF THE NEW JERSEY LEGISLATIVE DECISION TO LICENSE THOSE WHO PRACTICE PLUMBING AND THEREFORE IS EXEMPT UNDER THE STATE ACTION DOCTRINE.

The petition for *certiorari* is remarkable for its insistent reiteration of and total reliance on a proposition of combined fact and law – that "[t]he Board has simply taken . . . [privately-]fixed prices and enforced them upon the Petitioners and other plumbers who were not participants in the price fixing scheme" (Pb11) – which is absolutely untrue. As it relates to the Board specifically, the theory of the petitioners' case is based on a pair of flawed premises: the Board rule concerning unconscionable pricing has no foundation in New Jersey law and, that being assumed, the Board therefore uses the rule simply as legal camouflage for enforcing a specified "fixed price" for plumbing services from which a licensed plumber can deviate, even if ever so slightly, only at his or her peril. In actuality, however, the rule has as its source, and is deeply rooted in, New Jersey law of long and well-established standing that, in a broad variety of contexts, forbids unconscionably excessive pricing. Of critical

importance, furthermore, the legal standard for pricing unconscionability enunciated by that New Jersey source law is not deviation from a single price or narrow price range, but imposition upon the consumer of a price which is so unreasonable as to constitute a burden at odds with the common understanding of the ordinary and untrained member of the public. The Board rule thus has nothing whatever to do with "unsupervised vertically fixed prices . . . enforced . . . by a State agency" (Pb11; block capitalization omitted), and therefore this case presents no need or warrant for this Court to consider the doctrinal relationship among certain of its prior decisions as these petitioners demand. No justification for review being presented, this Court should deny *certiorari*.

A.

THE ADMINISTRATIVE RULE IN QUESTION IS GROUNDED IN LONG-ESTABLISHED NEW JERSEY LAW FORBIDDING IMPOSITION ON THE CONSUMER OF A PRICE BURDEN WHICH IS AT ODDS WITH THE COMMON UNDERSTANDING OF THE ORDINARY AND UNTRAINED MEMBER OF THE PUBLIC.

New Jersey has long had a strong public policy, enforced in various contexts, of condemning unconscionable pricing. From the legislative standpoint, price unconscionability has long been forbidden. The Uniform Commercial Code specifies that

> [i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it

> may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. [*N.J.S.A.* 12A:2-302(1)]

Similarly, the New Jersey Consumer Fraud Act, *N.J.S.A.* 56:8-1 *et seq.*, provides that the act, use or employment by any person of "any unconscionable commercial practice" is an unlawful practice. *N.J.S.A.* 56:8-2.

The courts in New Jersey as much as the New Jersey Legislature have long made certain that contractual unconscionability, including price unconscionability, will not be tolerated. In *Henningsen v. Bloomfield Motors, Inc.*, 32 *N.J.* 358, 403, 161 *A.* 2d 69, 94 (1960), the New Jersey Supreme Court condemned the lack of arms-length negotiation between consumer and manufacturer in the sale of automobiles and characterized the task of the judiciary as "protect[ing] the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer." Seven years later in *Ellsworth Dobbs, Inc. v. Johnson*, 50 *N.J.* 528, 553, 236 *A.* 2d 843, 856 (1967), the same court said:

> Courts and legislatures have grown increasingly sensitive to imposition, conscious or otherwise, on members of the public by persons with whom they deal, who through experience, specialization, *licensure*, economic strength or position, or membership in associations created for their mutual benefit and education, have acquired such expertise or monopolistic or practical control in the business transaction involved as to give them an undue advantage. [Emphasis added]

The New Jersey Supreme Court then specified the standard by which unconscionability would be adjudicated:

> Grossly unfair contractual obligations resulting from the use of such expertise or control by the one possessing it, which result in assumption by the other contracting party of a burden which is at odds with the common understanding of the ordinary and untrained member of the public, are considered unconscionable and therefore unenforceable. [50 *N.J.* at 554, 236 *A.* 2d at 856]

"[A] material departure from the standard puts a badge of fraud on the transaction and here the concept of fraud and unconscionability are interchangeable." *Kugler v. Romain*, 58 *N.J.* 522, 544, 279 *A.* 2d 640, 652 (1971).

The Board rule in question is a by no means atypical means of fulfilling this New Jersey policy against unconscionability in commerce. In 1971 the New Jersey Supreme Court promulgated a disciplinary rule forbidding attorneys from charging excessive fees. *See American Trial Lawyers Association v. New Jersey Supreme Court*, 66 *N.J.* 258, 267, 330 *A.* 2d 350, 355 (1974). The language of the New Jersey Supreme Court rule became the model for rules adopted by various of the Boards which regulate professions and occupations in New Jersey, including plumbing. The Board of Examiners of Master Plumbers rule is, indeed, virtually identical to the Supreme Court rule promulgated a quarter-century ago.

As with the New Jersey Supreme Court rule, a price is excessive under the rule challenged here when, after review of the facts, a licensee of ordinary prudence would be left with a definite and firm conviction that the price is so high as to be manifestly unconscionable or

overreaching under the circumstances (Pa27). *N.J.A.C.* 13:32-1.12(a). Of particular significance for the present case, "[t]he price customarily charged in the locality for similar services," *N.J.A.C.* 13:32-1.12(b)6., is only one of six explicitly stated factors which may be considered in determining whether a price is excessive;[4] moreover, the rule expressly does not limit consideration to the six factors specified, but permits consideration of any other factors which may be pertinent (Pa27). *N.J.A.C.* 13:32-1.12(b). Charging an excessive price constitutes occupational misconduct which may subject the licensee to Board discipline (Pa28). *N.J.A.C.* 13:32-1.12(c).

The Board rule thus plainly is consistent with the long-standing New Jersey public policy against unconscionable pricing in a broad variety of contexts. As the New Jersey Supreme Court has recognized, certain persons, "through experience, specialization, *licensure*, economic strength or position," possess such practical control in business transactions as to give them an undue advantage over those with whom they are dealing. *Ellsworth Dobbs, Inc. v. Johnson, supra*, 50 *N.J.* at 553, 236 *A.* 2d at 856 (emphasis added). The legal standard applicable in this sort of situation is simply common understanding. If the other contracting party assumes

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[4] Among the other circumstances which may be considered are the time and effort required, the novelty or difficulty of the job, the skill required to perform the job properly, any special conditions placed upon the performance of the job by the person or entity for which the work is being performed and the experience, reputation and ability of the licensee to perform the services (Pa27). *N.J.A.C.* 13:32-1.12(b)1. through 5.

> a burden which is at odds with the common understanding of the ordinary and untrained member of the public, [the contract is] considered unconscionable and therefore unenforceable. [50 *N.J.* at 554, 236 *A.* 2d at 856]

This legal standard for unconscionability is, of course, wholly different from a "fixed price" (Pb16). A fixed price is one which permits little or no upward or downward mobility. A conscionable price, by contrast, is one which permits a broad range of variation; only when the price becomes so high as to be utterly repugnant to a reasonable person's common understanding of propriety does it move from conscionability to unconscionability.[5] The "common understanding" underlying the Board rule of what constitutes an unconscionable price is thus identical to the standard used under Article 2 of the Uniform

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[5] As proved in the two disciplinary cases against him, the prices charged consumers by petitioner Joseph Fichner were indeed repugnant to a reasonable person's common understanding of propriety. In the first case, for example, State expert Robert Muller identified a reasonable hourly rate by striking the average of the highest rate he had found, $55, and the lowest rate, $35, the high figure being 57% higher than the low. It is not at all likely that the Board would have disciplined Fichner had he exceeded the percentage ranges to anything resembling a moderate and arguably justifiable degree. The Board disciplined Fichner only because in the first proceeding his charges were anywhere from 240% to 711% of the average of the customary charges for plumbing repairs in the locality in which he practiced and because in the second proceeding his charges were anywhere from 191% to 290% of that average.

The point is therefore clear. In finding Joseph Fichner guilty of occupational misconduct, the Board was not "fixing prices" for the plumbing trade; it was, instead, disciplining a licensee for gouging the consuming public.

Commercial Code, *N.J.S.A.* 12A:2-302(1), and the New Jersey Consumer Fraud Act. *N.J.S.A.* 56:8-2. The licensed plumber is, by virtue of being a Board licensee, no more onerously burdened than is any other purveyor of goods or services, whether licensed or unlicensed. If the Board rule be deemed a means of "price-fixing," so too must the Uniform Commercial Code, the Consumer Fraud Act and the multitude of judicial decisions forbidding unconscionable pricing. The notion is absurd.

It is against this backdrop that this Court must consider the petitioners' contention that the Board's unconscionable pricing rule is a vehicle for "price-fixing" in violation of the Sherman Act. In point of fact, the rule is solely a vehicle for fulfilling the Board's statutory obligation to protect the consuming public. See pp. 15-19, *infra*. In any event, even on the incorrect assumption that "price-fixing" is at all contemplated by the rule, the rule is exempted from Sherman Act applicability under the State action exemption doctrine. See pp. 19-28, *infra*.

B.

THE BOARD PROMULGATED THE ADMINISTRATIVE RULE FORBIDDING UNCONSCIONABLE PRICING IN FURTHERANCE OF ITS BROAD LEGISLATIVE AUTHORITY TO PROTECT THE CONSUMING PUBLIC. ESPECIALLY BECAUSE IT WAS THE BOARD RATHER THAN ANY PRIVATE GROUP THAT TOOK THE INITIATIVE IN ADOPTING AND ENFORCING THE RULE, THE RULE AND THE MANNER OF ITS ENFORCEMENT MOST CERTAINLY ARE NOT A PRICE-FIXING AGREEMENT UNDER THE SHERMAN ACT.

The indispensable essence of a Sherman Act violation is, of course, a price-fixing agreement. *E.g., Martin B.*

Glauser Dodge Company v. Chrysler Corporation, 570 F. 2d 72, 81 (3d Cir. 1977), *cert. den.* 436 *U.S.* 913 (1978). This rule is neither a price-fixing agreement nor a vehicle for such. The point must be made again. The Board of Examiners of Master Plumbers is a State administrative agency legislatively created to protect the consuming public. Pursuant to the State Plumbing License Law of 1968 as amended, *N.J.S.A.* 45:14C-1 *et seq.*, the Board is responsible for examining and then licensing those who meet statutory qualifications, *N.J.S.A.* 45:14C-15, and it has been legislatively delegated broad rulemaking authority. *N.J.S.A.* 45:14C-7. It may refuse to issue or may suspend or revoke a license and impose penalties upon proof of, among other matters, fraud or misrepresentation, *N.J.S.A.* 45:1-21b., or "professional or occupational misconduct as may be determined by the board. . . . " *N.J.S.A.* 45:1-21e. It is thus an entirely "foreseeable result," not only for purposes of the State action exemption doctrine, see discussion, pp. 19-28, *infra*, but generally, that the Board should have used these powers, especially its rulemaking power, to protect consumers from unconscionably high prices imposed by licensed plumbers under the Board's jurisdiction.

It is also foreseeable that the Board, upon being apprised, as it was with respect to Joseph Fichner, of multiple violations of its excessive pricing rule, should have heard disciplinary charges against that licensee and then, the charges having been proved, disciplined him accordingly. Critically, it was not the defendant trade associations nor any other private group that instigated the disciplinary actions against Fichner. Rather, it was the Board, upon receiving and investigating the complaints

of numerous consumers, that took the initiative in disciplining Fichner for charging prices which no reasonable person could consider conscionable. The Board grounded its disciplinary determinations, furthermore, squarely on the rule and on the New Jersey source law from which it springs. Beyond any question, then, the Board in enforcing its rule actively exercises the authority and power of the State.[6]

It is because it was the Board that took the initiative in enforcing its rule against Fichner that Robert Muller came to act as an expert witness on behalf of the State. Again, it was not Mr. Muller who somehow inveigled his way into the disciplinary proceedings or, worse, was thrust into their midst by the private associations; rather, it was the Attorney General of New Jersey, responsible for prosecuting the disciplinary complaints, who sought out Mr. Muller for expert assistance. It is from this perspective that Mr. Muller's statements must be assessed. To the extent that Mr. Muller was acting in his expert

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[6] As detailed in the text, this exercise of State authority is not one of price-fixing, and most certainly the deputy attorney general who prosecuted the second *Fichner* disciplinary case did not say otherwise. Rather, the deputy attorney general made the remarks now quoted (Pb6) in the midst of a debate with opposing counsel over the qualifications of State expert Robert Muller in the area of plumbing pricing (Ja190, 191). Mr. Muller having acknowledged that he had no educational background or experience in price surveying, the deputy attorney general argued nonetheless in favor of his expertise on the entirely obvious thesis that any licensed plumber must have some understanding of those prices that are conscionable as opposed to unconscionable. The Board did accept Mr. Muller's testimony.

witness capacity for the State, he stands squarely under the umbrella of the State action exemption. See discussion, pp. 19-28, *infra*. Moreover, talking with others, even talking with others "on a regular basis" (Pb5), about prices is not in itself unlawful. "[I]n the absence of any indication of agreement or consent to an illegal arrangement, evidence of industry meetings is not sufficient to prove a conspiracy." *Zoslaw v. MCA Distributing Corporation*, 693 F. 2d 870, 885 (9th Cir. 1982). *Accord Hanson v. Shell Oil Company*, 541 F. 2d 1352, 1359 (9th Cir. 1976), *cert. den.* 429 *U.S.* 1074 (1977). In any event, as affirmed by Mr. Muller:

> These discussions have always been restricted to factors which should be considered by a member in formulating a price or price range for the services and products which he offers to the general public. . . . These discussions have not involved any attempt to prescribe or establish prices or price ranges which must or should be charged by members to the general public. [Ja22, 23]

From the standpoint of the Board certainly, then, the unconscionable pricing rule and the manner of its enforcement are not a "price-fixing" mechanism. The Board drew on the expertise of Robert Muller and then disciplined Joseph Fichner because it had a statutory responsibility to fulfill – a statutory responsibility to prevent or discipline occupational misconduct and other improper behavior, including unconscionably excessive pricing for plumbing services. It must be stressed also that the Board has *not* shown "antagonism to flat fee pricing" (Pb6). It may be that that method of pricing plumbing services can lead to abuses, and the Board,

because of its obligation to protect the consuming public, surely is justified in being concerned about such possible abuse. Nevertheless, the Board is not in the business of specifying what pricing methods are to be used by licensees. Its role as defined by legislative enactment is, rather, that of making certain that, whatever pricing method is used, the consumer is treated conscionably. The Board has been doing just that in administering its excessive pricing rule, and consequently there is not and cannot be a Sherman Act violation.

C.

UNDER THE STATE ACTION DOCTRINE, THE NEW JERSEY LEGISLATIVE DECISION TO LICENSE THOSE PERSONS WHO PRACTICE THE PLUMBING TRADE IS A STATE DETERMINATION TO DISPLACE MARKET COMPETITION WITH GOVERNMENTAL REGULATION WHOSE FORESEEABLE RESULT IS THE REGULATORY PROHIBITION OF PRICING UNCONSCIONABILITY BY LICENSEES. THIS COURT HAS NEVER SAID OTHERWISE, AND CONSEQUENTLY THIS CASE DOES NOT IMPLICATE ANY OF THIS COURT'S PRECEDENTS AS TO JUSTIFY REVIEW BY CERTIORARI.

For the past half-century this Court has recognized that the Sherman Act, 15 *U.S.C.A.* § 1 *et seq.*, does not encompass a State's regulatory activities which in some measure displace market competition with legislative or administrative control. *Parker v. Brown*, 317 *U.S.* 341 (1943). In brief, Congress did not intend to restrict a State from imposing, as an act of government, regulatory restraints which to some extent are anticompetitive. In one sense, narrow but important, this case does not even

implicate either the State action immunity doctrine or, at bottom, the Sherman Act itself because, as discussed, the State of New Jersey through the Board rule is not mandating "price-fixing" at all, the rule being merely a means of deterrence against and discipline for pricing which is so excessive as to be socially repugnant. In a broader sense, however, State action immunity is implicated. The State legislative decision to license those persons who practice a particular occupation is, *par excellence*, State action which supplants competition with regulation, for by definition licensing restricts the market of available purveyors of the particular occupational service to those who have been granted the license. Foreseeable results of the governmental decision to license are, furthermore, that licensees will be obligated to adhere to appropriate ethical and occupational standards and that they will be disciplined for failing to do so. Disciplining a licensee for consumer price gouging – exacting from consumers unconscionably high fees by dint of the licensee's superior bargaining position – is precisely the kind of result which the governmental decision to license necessarily entails. Such regulatory action by State government is thus exempt from the Sherman Act.

In *Parker v. Brown* this Court noted that the State regulatory program there, the California Agriculture Prorate Act restricting competition among food producers, "was never intended to operate by force of individual agreement or combination." 317 *U.S.* at 350. Instead, "[i]t derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command." *Ibid.*

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. [*Id.* at 350-51]

California had imposed the regulatory program solely as "an act of government which the Sherman Act did not undertake to prohibit." *Id.* at 352.

In the decades since *Parker v. Brown*, this Court has not retreated from the proposition that State regulatory programs are not subject to Sherman Act scrutiny. Rather, this Court has merely refined the analytical tools employed for ascertaining the circumstances in which a program ostensibly specified by the State is in truth an "act of government" and therefore immune under the State action doctrine. For the general run of cases a two-pronged standard for testing the *bona fides* of a claimed State action exemption is to be applied.

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. [*California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 *U.S.* 97, 105, (1980), quoting *Lafayette v. Louisiana Power & Light Company*, 435 *U.S.* 389, 410 (1978) (Brennan, J., plurality opinion)]

These requirements – "clear articulation" and "active supervision" – serve merely an evidentiary function, however, being "way[s] of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie v. City of Eau Claire*, 471 *U.S.* 34, 47 (1985).

Thus, with respect to "clear articulation," the state legislature need not have stated explicitly its expectation that the governmental body would engage in conduct that will have anticompetitive effects; it is enough that the conduct is "a foreseeable result" of legislatively empowering the governmental body and that "anticompetitive effects logically would result from this broad authority to regulate." 471 *U.S.* at 42. Nor need the governmental agency show that it is under "compulsion" to engage in the particular conduct, for when it is "acting pursuant to a clearly articulated state policy, compulsion is simply unnecessary as an evidentiary matter to prove that the challenged practice constitutes state action." *Id.* at 45. With respect to the "active supervision" element, "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interest, rather than the governmental interest of the State." *Id.* at 47. By contrast:

> [w]here the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. [*Ibid.*]

"Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function."[7] *Ibid.* The analysis simply asks "whether the State has played a substantial role in determining the specifics of the economic policy." *Federal Trade Commission v. Ticor Title Insurance Company*, 504 *U.S.* 621, 635 (1992).

In short, "[w]hen the conduct is that of the sovereign itself, . . . the danger of unauthorized restraint of trade does not arise." *Hoover v. Ronwin*, 466 *U.S.* 558, 569 (1984) "Congress never intended that the [Sherman] Act be employed to handcuff state governments in the pursuit of their traditional regulatory functions." *Healey v. Bendick*, 628 *F. Supp.* 681, 689 (D.R.I. 1986). The governmental act of licensing particular persons and thereby specifying those persons alone as those who are capable and legally entitled to engage in a particular profession or occupation is indeed a "traditional regulatory function[ ]." It is an act by which the State unambiguously declares its intention

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[7] Although *Town of Hallie v. City of Eau Claire* concerned the State action exemption of a municipality, this Court, though not deciding the question, there observed that "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required. . . . " 471 *U.S.* at 46, n. 10. Furthermore, as this Court observed in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 *U.S.* 48, 64 (1985), administrative agencies are created precisely because they are able to deal with problems unforeseeable to or beyond the competence of the legislature, and requiring express authorization for every action that an agency might take would diminish if not destroy its usefulness. Active supervision thus is not an issue here.

to displace the competition of the free market with regulatory controls that are, in a sense, "anticompetitive." As the District of Columbia Circuit has said, "[S]tate regulation of the practice of optometry" – or of plumbing, medicine, professional engineering, electrical contracting and a host of other professions and occupations – "is a quintessentially sovereign act." *California State Board of Optometry v. Federal Trade Commission*, 910 F. 2d 976, 982 (D.C. Cir. 1990). For any of the licensed professions or occupations, "the [licensing board] is designated to serve as the state's administrative adjunct for purposes of regulating the [profession or occupation in question]." *Brazil v. Arkansas Board of Dental Examiners*, 593 F. Supp. 1354, 1362 (E.D. Ark. 1984), *aff'd* 759 F. 2d 674 (8th Cir. 1985).

The governmental determination that a particular trade or profession is to be practiced only by those persons who are licensed according to government standards therefore is intrinsically a determination which restricts what would otherwise be a *laissez faire* free market of competition. To be sure, if government chose to allow *laissez faire* to reign, the free competitive market would after a time surely identify and separate those practitioners who are competent and those who are not. Just as the public would eventually learn, from botched diagnoses and surgical operations and ensuing injuries and deaths, which persons acting as physicians were incapable, so too would the public eventually learn from septic poisoning which persons proved their incompetence at plumbing by mistakenly linking sewer pipes with fresh water pipes. As discussed, however, see pp. 15-16, *supra*, the New Jersey Legislature has elected to forego such painful rigors of the free market and substitute for them a

governmental administrative system that identifies at the outset those persons who are competent to practice the various professions and occupations. Those individuals are licensed upon a showing of competence and are disciplined when they do not adhere to professional or occupational standards.

Consequently, it is an entirely "foreseeable result," *Town of Hallie v. City of Eau Claire, supra,* 471 *U.S.* at 42, that the Board should have used this legislative structure to protect consumers from unconscionably high prices imposed upon them by licensed plumbers under the Board's jurisdiction. There is no question that the Board unconscionable pricing rule "derive[s] its authority and its efficacy from the legislative command of the state and [is] not intended to operate or become effective without that command." *Parker v. Brown, supra,* 317 *U.S.* at 350. As mentioned, it is true that the rule does not fit absolutely squarely into the State action immunity doctrine, but that lack of absolute fit is attributable solely to the fact that, in contrast to true *Parker v. Brown* exemption cases, the rule is not a means for "price-fixing" at all, since its requirement is not that licensees adhere to some specified price or price range, but only that they not charge prices so high as to be at odds with the common understanding of the ordinary, untrained member of the public. Still, the legislative and regulatory scheme of which the rule is a part undeniably constitutes "the replacing of entirely free competition [in the plumbing field] with [a] form of regulation . . . authorized . . . by the state," *Hoover v. Ronwin, supra,* 466 *U.S.* at 568, and therefore the rule is shielded by State action immunity.

Given the character of the Board legislative mandate and the manner in which the Board rule implements that mandate, it is clear that neither the Court of Appeals nor the District Court in this case applied pertinent case law so as to "set aside the result" of any of this Court's precedents (Pb11; block capitalization omitted), and it is equally clear that there is no need for this Court to "clarify" the relationship among those precedents (Pb11; block capitalization omitted). *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 *U.S.* 365 (1991), did make clear that the State action immunity doctrine is broadly applicable and is not circumscribed by any "conspiracy exception."

> [W]e reaffirm our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on "perceived conspiracies to restrain trade,". . . . We reiterate that, with the possible market participant exception, *any* action that qualifies as state action is "ipso facto . . . exempt from the operation of the antitrust laws,". . . . [499 *U.S.* at 379, quoting *Hoover v. Ronwin, supra*]

To be sure, this Court in *Omni* did not intend to change the law so as to grant State action immunity to private price-fixing having no genuine relationship with State action or policy. *See generally Federal Trade Commission v. Ticor Title Insurance Company; California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., supra.* The point again, however, is that that is not this case.

This case most certainly is not comparable to the *Midcal* case. It simply is not so that the "only difference"

between that case and this is the difference between fair trade laws and an occupational licensing law (Pb12). Even on the assumption that the present case genuinely involved the fixing of prices, this Court in *Midcal* was most explicit in detailing how the State of California there was at most a passive participant that merely allowed private persons to do what they wanted.

> The State neither establishes prices nor reviews the reasonableness of the [wine] price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. [445 *U.S.* at 105-106]

In *Midcal*, California did not "review the reasonableness" of the prices set by private persons. *Id.* at 100. Here, by contrast, reviewing the reasonableness of prices charged for plumbing services is precisely the purpose of the State of New Jersey through the Board and its unconscionable pricing rule. To be sure, the review, to state the point yet again, is not that of fixing prices, but of assuring that the prices charged are conscionable when judged against the broad measure of conscionability specified by New Jersey law. That there is such review nonetheless cannot be doubted. The two-fold conclusion therefore is obvious. New Jersey is not fixing prices at all, and the Sherman Act is not at all implicated. To the extent, however, that federal antitrust law and policy might be deemed implicated, there is no question that "the State has played a substantial role in determining the specifics of the economic policy." *Federal Trade Commission v. Ticor Title Insurance Company, supra,* 505 *U.S.* at 635. In this latter sense,

the administrative rule unquestionably is protected by the State action immunity doctrine.

From whichever perspective this case may be viewed, there is no justification for review by this Court. The administrative rule in question is not a means for price fixing at all; in any event, the rule is shielded by the State action doctrine. The petition for *certiorari* therefore should be denied.

CONCLUSION

It is respectfully submitted that for these reasons the petition for *certiorari* should be denied.

Respectfully submitted,

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95-1630 (3)

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In The

Supreme Court of the United States

October Term, 1995

ANTOINE NASSIMOS, JOSEPH FICHNER, JR., MICHAEL CONROY, ANTHONY ROSSI, DANIEL W. WELTMAN, GEORGE STEINER, WILLIAM A. MOORE, WILLIAM TEDESCO, MICHAEL IGNOZZI and ALAN HANZO,

Petitioners,

vs.

THE NEW JERSEY BOARD OF EXAMINERS OF MASTER PLUMBERS; NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, INC.; BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS; and ROBERT MULLER, individually and in his capacity as an officer of the NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, THOMAS BIONDI and ALAN FEID,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, INC. AND BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS

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QUESTIONS PRESENTED FOR REVIEW

1. Were the decisions of the District Court and the Court of Appeals in this case that the enforcement by a state agency of a state regulation prohibiting excessive prices did not constitute a conspiracy to restrain trade and was within the scope of state action immunity to Sherman Act liability inconsistent with the decisions of this Court in *Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991), *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) or *Federal Trade Commission v. Ticor Title Insurance Company*, 504 U.S. 621 (1992)?

2. May a private party be held liable under the Sherman Act based upon an allegation that it participated in a conspiracy with a state agency to fix prices in violation of the Sherman Act through the enforcement by the state agency of a state regulation prohibiting excessive prices, when the regulation and its enforcement plainly do not constitute a conspiracy to restrain trade and when the actions of the state agency are themselves within the scope of state action immunity to Sherman Act liability?

3. May a trade association which represents no more than four percent of the members of an occupation in a state be held liable for horizontal price fixing in an action by competitors in the occupation of the members of the association, when it is undisputed that the association does not prescribe a particular price or price ranges which must be charged by its members, that any communications regarding prices which may have occurred between members did not occur at association meetings but only following such meetings and were undertaken by an expert witness engaged by the state to gather information about prices charged in the industry, that such alleged communications had no

affect on the ability of the plaintiffs to charge for their services as they chose, and that there is no allegation in the case of predatory pricing?

PARTIES TO THE PROCEEDING

Petitioners are ten individuals who are engaged in the trade of plumbing in the State of New Jersey. Eight of the plaintiffs are licensed master plumbers in the State of New Jersey. The other two plaintiffs have applied for licenses. Petitioners were all plaintiffs before the District Court.

Respondent The New Jersey Board of Examiners of Master Plumbers (the "Board") is an administrative body within the Division of Consumer Affairs of the Department of Law and Public Safety of the State of New Jersey. It was created pursuant to N.J.S.A. 45:14C-1, *et seq.* and is authorized by the New Jersey State Legislature to license and regulate master plumbers.

Respondent the New Jersey Association of Plumbing-Heating-Cooling Contractors ("NJAPHCC") is a statewide trade association of plumbing, heating and cooling contractors.

Respondent Bayshore Association of Plumbing, Heating and Cooling Contractors ("Bayshore") is a trade association of plumbing, heating and cooling contractors and is a local affiliate of the NJAPHCC. (NJAPHCC and Bayshore are collectively referred to herein as the "Trade Associations").

Respondents Thomas Biondi ("Biondi") and Alan Feid ("Feid") are members of the NJAPHCC and served as chairmen of the Board during past administrative disciplinary hearings concerning Petitioner Joseph Fichner, Jr. ("Fichner").

Respondent Robert Muller ("Muller") is a member of the NJAPHCC and Bayshore who testified as an expert on behalf of the State of New Jersey at the hearings conducted by the Board concerning Petitioner Fichner.

Respondents were all defendants before the District Court.

The Attorney General of the State of New Jersey has represented the Board as well as Biondi, Feid and Muller (the "Individual Respondents") and is submitting a separate brief in opposition to the Petition for Writ of Certiorari. This brief is submitted on behalf of the Trade Associations.

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STATEMENT OF THE CASE[1]

This action represents an attempt by the Petitioners to use the Sherman Anti-Trust Act, 15 U.S.C. § 1, to attack the system whereby the State of New Jersey regulates plumbers who practice their trade in the State. The United States District Court for the State of New Jersey and the United States Court of Appeals for the Third Circuit have rightly held that this effort by Petitioners is precluded by the state action exception to the Sherman Act.

A. The Relevant Facts

1. New Jersey's System for the Regulation and Licensing of Plumbers.

The New Jersey State Legislature has established an administrative system whereby individuals wishing to practice certain professions and occupations, ranging from accountants to veterinarians, must obtain licenses from and submit to regulation by specialized professional boards and commissions. Such boards and commissions are State agencies and their members are appointed by the Governor. *See* New Jersey Statutes Annotated, Title 45.

To regulate the trade of plumbing, the New Jersey State Legislature has created an administrative board known as The State Board of Examiners of Master Plumbers and granted to it the authority to adopt, amend and promulgate rules and

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1. The Statement of the Case in Petitioners' Petition for Writ of Certiorari omits certain significant facts contained in the record below. Although Petitioner's application for certiorari, and indeed the issues presented by this case, can be decided without resort to these facts, the Trade Associations set them forth in this Statement of the Case pursuant to Sup. Ct. Rule 15.1.

regulations. *See* N.J.S.A. 45:14C-3; N.J.S.A. 45:14C-7. The Board has in turn adopted a comprehensive set of regulations which apply to all of the approximately 8,000 licensed plumbers who do business in the State of New Jersey. *See* N.J.A.C. 13:32-1, *et seq.*

One of the regulations which has been adopted and enforced by the Board prohibits unconscionable pricing by plumbers. *See* N.J.A.C. 13:32-1.12.[2] Pursuant to that regulation, the Board possesses the authority to sanction plumbers for charging unconscionable prices. In determining whether a price is unconscionable the Board is charged with considering six non-exclusive factors including "the price customarily charged in the locality for similar services."

This case arises out of Petitioners' dissatisfaction with the Board's adoption and enforcement of N.J.A.C. 13:32-1.12 and in particular with the Board's determinations in two separate proceedings that Petitioner Joseph Fichner, Jr. was guilty of unconscionable pricing. Respondent Muller testified as an expert witness on behalf of the State at both of the proceedings relating to Fichner. Respondent Biondi served as Chairman of the Board during the first proceeding and Respondent Feid served in that capacity during the second proceeding.[3]

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2. Similar rules regulations have been adopted by the boards which regulate other professions and by the New Jersey Supreme Court in connection with its authority to regulate the practice of law in the state. *See e.g.*, N.J.A.C. 13:35-6.11 (Physicians); N.J.A.C. 13:44E-2.13 (Chiropractors); Rules of Professional Conduct 1.5 (Attorneys).

3. Petitioners note that Respondents Biondi and Feid were both members of NJAPHCC when they chaired the Board. However, it should be noted that the Board consists of nine members who are selected from such diverse groups as licensed master plumbers, inspectors, representatives and

(Cont'd)

Petitioners allege that determinations by the Board in the two Fichner administrative proceedings that Fichner was guilty of unconscionable pricing somehow constituted price fixing. Moreover, Petitioners contend that the Board made those determinations, not in a good faith effort to implement its lawful authority, but as a result of a conspiracy between the Board, Biondi, Feid, Muller, and the Trade Associations.

2. *The Board's Administrative Proceedings With Regard to Petitioner Fichner.*

The Board has twice found that Petitioner Fichner has engaged in precisely the type of conduct which N.J.A.C. 13:32-1.12 was intended to eliminate, *i.e.*, the price-gouging of unknowing consumers. In coming to this conclusion, the Board considered evidence ranging beyond the prices charged by others in the industry. As demonstrated in the final decisions and orders included in the record (Ja-38, Ja-59, Ja-90), the Board considered the full panoply of facts relevant to its determination.

Thus, in 1988, the Attorney General of the State of New Jersey filed a six-count administrative complaint accusing Fichner of deceptive and misleading practices. Specifically, Fichner was charged with inducing five consumers to enter into contracts for plumbing services and charging those consumers prices which were excessive for the materials and services provided. (Ja-28). The Board reprimanded Fichner, ordered him to pay restitution and imposed a $5,000 civil penalty. These penalties were based on a finding by the Board that Fichner had engaged in unconscionable pricing practices. (Ja-38, Ja-59). This decision was affirmed by the Appellate Division of the Superior Court of the State of New Jersey. (Ja-76).

(Cont'd)
the public at large. At any given time, only one member of NJAPHCC was a member of the Board. Thus, Biondi and Feid never served on the Board simultaneously. (Ja-218).

In 1992, the New Jersey Attorney General filed a second disciplinary complaint against Fichner. Fichner was charged with having engaged in deceptive sales practices whereby he charged unconscionable prices to seven consumers. (Ja-79). The Board found Fichner guilty of occupational misconduct, imposed civil penalties of $35,000 and costs of $9,844.50, and required Fichner to pay restitution. (Ja-90). The Appellate Division reversed and remanded this decision on the grounds that certain members of the Board did not meet the statutory requirements for holding that office. The Appellate Division did not disagree with the Board's findings regarding Fichner. On the contrary, the Appellate Division commented on "what [the Board] *understandably* considered to be his egregious conduct in continuing to engage in unconscionable commercial practices . . ." (Emphasis added). The Attorney General appealed and the case is now pending before the New Jersey Supreme Court.

In each of the administrative proceedings with regard to Fichner, the New Jersey Attorney General engaged Respondent Muller to testify as an expert. Among other things, Muller testified regarding "the price customarily charged in the locality for similar services." Solely as a means of gathering information in preparation for his testimony, Respondent Muller engaged in certain occasional communications with other plumbers regarding pricing. These communications were not part of any official agenda or business of the Trade Associations. They occurred after Trade Association meetings had been concluded, solely because the meetings provided a useful social forum for Muller at which he could meet with others in the industries who were knowledgeable about prices that are charged for services rendered. (Ja-23).

3. The Respondent Trade Associations.

Respondents NJAPHCC and Bayshore are small

incorporated trade associations. NJAPHCC was formed in, and has operated continuously since, 1902. Its members generally include people engaged in the plumbing, heating, and air conditioning fields in the State of New Jersey. (Ja-26). Bayshore is one of 15 local affiliates of NJAPHCC and members of Bayshore are also members of NJAPHCC. Bayshore draws its membership from contractors in the northern Monmouth County and southern Middlesex County areas. Membership in each Trade Association is voluntary and there is no requirement that a contractor in the plumbing, heating or air conditioning fields belong to either organization. As a result, NJAPHCC and Bayshore do not represent all of the contractors in the various industries from which they draw their members. (Ja-26). Indeed, NJAPHCC presently has a total of approximately 550 members, only approximately 350 of whom are licensed plumbers. (Ja-217). Bayshore presently has only 50 members, only some of whom are licensed plumbers. Thus, within an industry of approximately 8,000 licensed plumbers in the State of New Jersey, the membership of NJAPHCC and Bayshore represent only approximately 4% and substantially less than 0.7% of the total, respectively.

It is undisputed that neither NJAPHCC nor Bayshore had involvement with or input as to the adoption, enactment or enforcement of N.J.A.C. 13:32-1.12 by the Board. In fact, neither Trade Association has had any contact with the Board concerning the rule or its enforcement. (Ja-23, 26).

Moreover, it is undisputed that there has been no attempt by NJAPHCC or Bayshore to prescribe a particular price or price ranges which must be charged by their members. Members are left to structure their own prices and price ranges which they will charge for particular services to their customers. (Ja-26). Even the discussions regarding prices testified to by Respondent Muller upon which Petitioners place such great reliance were not

part of any official agenda or business of the Trade Associations at the meetings at which they occurred. Indeed, these discussions invariably occurred after the meetings had been concluded. (Ja-23). These discussions were undertaken by Muller solely as a means of gathering information in preparation for his testimony at the hearings concerning Fichner. (Ja- 23). As noted above, they occurred following Trade Association meetings, solely because the meetings provided a useful forum for Muller to meet others in the industry who were knowledgeable about prices charged for services rendered. (Ja-23).

Moreover, neither NJAPHCC nor Bayshore — representing 4% and less than 0.7% of plumbers in New Jersey — has the type of market power which would even permit it to engage in an effort to establish, stabilize or fix prices. Indeed, it is apparently their recognition that the Trade Associations lack the power to fix prices that has lead Petitioners to expressly state in their complaint that nothing done by the Trade Associations alone has affected their ability to charge the prices that they choose for their services and to instead ground their allegations of price fixing exclusively on the actions of the Board in enforcing N.J.A.C. 13:32-1.12. (*See* Section B, *supra.*).

B. The Proceedings Below

Petitioners filed their complaint in this matter on March 17, 1994 and subsequently filed their Amended Complaint on May 27, 1994. Petitioners' claims are grounded in their allegations that the Board has used N.J.A.C. 13:32-1.12 to fix the prices which plumbers can charge for their services as a result of a conspiracy with the Trade Associations, Biondi, Feid and Muller.

Petitioners' Amended Complaint alleges that the Board, through its adoption and implementation of N.J.A.C. 13:32-

1.12, is coercing Petitioners to change fixed prices under threat of being sanctioned if they fail to do so. Petitioners rely specifically on the administrative proceedings in which Petitioner Fichner was fined and otherwise sanctioned for violations of N.J.A.C. 13:32-1.12. (Am. Complaint, Count I ¶ 9, Count II ¶¶ 2, 3 & 5). Petitioners accuse Respondent Muller of using his testimony before the Board to communicate to the Board rates allegedly discussed by members of the Trade Associations. As a result of this testimony by Muller, Petitioners accuse Muller, the Trade Associations and the Board with conspiring to fix the prices which may be charged by Plumbers for their services. (Am. Complaint, Count II ¶¶ 3-4). Petitioners also accuse Respondents Biondi and Field of using their positions as Board members and NJAPHCC members to advance this conspiracy. (Am. Complaint, Count I ¶ 8). Based on these allegations, Petitioners charge the Board, NJAPHCC, Bayshore and the Individual Respondents with violating the Sherman Anti-Trust Act.[4]

Thus, the crux of Petitioners' allegations is that the Board has fixed prices and that it has done so as a result of a conspiracy between the Board, the Trade Associations, Biondi, Feid and Muller. Although Petitioners allege in the Amended Complaint that members of NJAPHCC and Bayshore engaged in discussions at their respective meetings regarding "the prices charged and to be charged to consumers by the associations' members" (Am. Complaint, Count I ¶ 1), Petitioners expressly assert that these alleged discussions have had no impact on the ability of each Petitioner "to charge for his services as he determined in his discretion." (Am. Complaint, Count I ¶ 4). Instead, Petitioners rely exclusively on the alleged actions of the

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4. In their petition, Petitioners inaccurately state that they have asserted claims under the New Jersey Antitrust Act. No such claims can be found in the Complaint or the Amended Complaint.

Board to support their allegation that they have been deprived of their ability to determine the prices at which they sell their services. (Am. Complaint, Count I ¶ 5). Thus, the allegations regarding the Trade Associations are inextricably intertwined with and are dependant on the allegations regarding the Board.

The New Jersey Attorney General (on behalf of the Board, Biondi, Feid and Muller) and the Trade Associations responded to Petitioners' Amended Complaint by filing motions for summary judgment and dismissal on the grounds, among others, that the alleged conduct by the Respondeo ' in connection with the adoption and enforcement of N.J.A.C. 13:32-1.12 was within the scope of the state action exception to Sherman Act liability. Petitioners subsequently filed a cross-motion seeking preliminary equitable relief.

On January 19, 1995, the United States District Court entered a Memorandum and Order dismissing the complaint as to all Respondents. (Ja-239). The District Court first held that the State action exception to liability under the Sherman Act applied to the actions by the Board which are the subject of Petitioners' Amended Complaint. (Ja-247). The District court also noted that, as this Court held in *Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991), there is no conspiracy exception to state action immunity. Turning to the claims against the Trade Associations, the District Court recognized that, because the Board's actions in enforcing the Rule were found to be legally permissible, the charge that the Trade Associations conspired with the Board in connection therewith similarly had to fall. The District Court also found that there was simply no evidence that the alleged conspiracy had resulted in fixed prices. In addressing the claims against the Trade Associations, the Court stated:

> There is simply no support for plaintiff's

> assertion that the Board's enforcement of the requirement that plumbers not charge unconscionably excessive prices has effectively "fixed" the price which a licensed plumber may charge for plumbing services. Indeed, evidence of the price customarily charged in the locality for similar services is only one of six factors which may be considered in determining whether a price charged is excessive within the meaning of the rule. Plaintiffs' theory of a conspiracy to fix prices rests on the allegation that the Board is wrongfully enforcing N.J.A.C. 13:32-1.12 and since this allegation is without merit, plaintiffs' assertions of an antitrust violation fails as to defendants NJAPHCC and Bayshore as well.

(Ja-248). Finally, the District Court denied Petitioner's motion for preliminary relief on the grounds that all issues in the complaint had been decided in favor of the Respondents. (Ja-249).

Petitioners appealed and the United States Court of Appeals for the Third Circuit affirmed the District Court decision. The Third Circuit stated that:

> After consideration of all contentions raised by the parties, we find that the above action is directly controlled by the decision in *Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 379 (1991).

Petitioners moved for reconsideration and reconsideration en banc. Both motions were denied.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT AND THE COURT OF APPEALS DID NOT RULE THAT INDEPENDENT VIOLATIONS OF THE SHERMAN ACT BY PRIVATE PARTIES WERE IMMUNIZED BY SUBSEQUENT ACTION BY A STATE AGENCY.

Petitioners contend that the decisions by the District Court and the Third Circuit Court of Appeals in this case were inconsistent with the holding of this Court in *Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 379 (1991) in that they allegedly immunized Sherman Act violations by private parties, which were independent of any state action, based solely on subsequent adoption of the private actions by a state agency.[5] However, the decisions below did no such thing. Contrary to the suggestions in the Petition for Writ of Certiorari, the Amended Complaint does not even *assert* any claims against the Trade Associations which are independent of the claimed state action. Indeed, Petitioners' allegations in the Amended Complaint make it clear that this case does not involve alleged independent violations of the Sherman Act by the Trade Associations. It is rooted exclusively in alleged violations of the Act by a state agency which allegedly resulted from a conspiracy with private

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5. Pursuant to Supreme Court Rule 10.1, "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." The only argument apparently made by Petitioners that such "special and important reasons" exist in this case is their contention, in each of the three points in the Petition, that the determinations by the District Court and the Court of Appeals were not in accordance with certain decisions by the United States Supreme Court. Petitioners do not contend that any other grounds for a finding of "special and important reasons" (whether listed in Rule 10.1 or otherwise) is present in this case.

parties. This is precisely the scenario which this Court, in *Omni*, held could not serve as a basis for liability under the federal antitrust laws.

This Court's decision in *Omni* made it clear that there is no conspiracy exception to the state action exception to Sherman Act liability. In other words, an action which would be exempt from Sherman Act liability does not become subject to such liability solely because it allegedly resulted from a "conspiracy". *See Omni*, 499 U.S. at 379. Indeed, in *Omni*, this Court expressly rejected "any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade' ". *Id.* (citations omitted). Petitioners' allegations in this case fall squarely within this ruling. Petitioners have alleged that the Board used its authority to enforce the prohibition on excessive pricing in N.J.A.C. 13:32-1.12 as a means of price fixing, because of an alleged conspiracy with the Trade Associations, Biondi, Feid and Muller. Thus, the District Court's dismissal of the claims against the Board, the Trade Associations and the Individual Respondents, and the Third Circuit's affirmance of the dismissal, were appropriate and should be affirmed.

Petitioners are now attempting to circumvent the main holding of *Omni* by focusing on an irrelevant and subsidiary aspect of the case. In *Omni*, there were two sets of allegations against the private party defendants. First, the plaintiff alleged that the private party defendants conspired with the City of Columbia to have the City adopt certain resolutions regarding the size and locations of billboards. 499 U.S. at 369. Second, the plaintiff alleged that the private parties engaged in other, independent anti-competitive actions, such as trade libel, the setting of artificially low rates and the inducement of breach of contract which allegedly gave rise to independent causes of action. *Id.* at 384. It was this second set of independent allegations which this Court

held was not within the scope of the state action exception. In this case, there are no such allegations regarding anti-competitive actions by the Trade Associations which are independent of the alleged "conspiracy" with the Board and allegedly give rise to independent causes of action.

In this case, all claims against the Trade Associations are inextricably intertwined with the actions of and claims against the Board. A review of Petitioners' Amended Complaint makes it clear that the claims against the Trade Associations devolve from and are dependant on the claims against the Board. Petitioners do not allege that the Trade Associations have *unilaterally* fixed prices. This is not a mere omission. It is an express and affirmative allegation of fact which provides one of the main premises of Petitioners' case. After alleging that there were discussions of prices among members of the Trade Associations, Petitioners assert that, despite these alleged discussions:

> 4. . . . Ordinarily, . . . each plaintiff would be free to charge for his services as he determined in his individual discretion.

(Amended Complaint, ¶ 4).

Indeed, rather than alleging that the Trade Association themselves fixed prices, Petitioners allege that the Board fixed prices — because it was acting in accordance with a conspiracy with the Trade Associations. Thus, Petitioners allege that:

> 5. The plaintiffs, *nevertheless*, have been and are being forced to charge rates as established by the NJAPHCC and its affiliated local organizations by virtue of a Rule established by the BOARD and the

> actions of the BOARD's members, in particular BIONDI and FEID, in enforcing that Rule.

(Emphasis added). (*See also* Amended Complaint ¶¶ 6-9, 11). Plainly, Petitioners' claims against each of the Respondents, including the Trade Associations, are grounded in their allegation that the Board has used N.J.A.C. 13:32-1.12 to fix prices. Petitioners have expressly alleged that the Trade Associations did *not* fix prices on their own.

The reason is obvious. There is no basis in fact for such an independent claim against the Trade Association. Moreover, even if Petitioners wished to do so, they would not possess standing to assert a claim based solely on alleged discussions among members of the Trade Associations regarding prices. These alleged communications could not cause anti-trust injury to Petitioners as competitors. Absent such an injury, Petitioners would be without standing to assert a Sherman Act claim, even if the Trade Associations had agreed to fix prices, so long as those prices were not predatory. *See* 15 U.S.C. § 15; *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1989) (vertical agreement to fix non-predatory prices does not cause antitrust injury conferring standing on competitor); *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 585 n. 8 (1985) (horizontal agreement to fix prices would not cause antitrust injury to competitor absent predatory pricing). There is no allegation in this case that the alleged communications between the members of the Trade Associations regarding prices resulted in predatory pricing. Indeed, Petitioners have admitted that they would not be injured by the alleged pricing practices of the members of the Trade Associations absent the Board's enforcement of N.J.A.C. 13:32-1.12.

Thus, as the District Court noted:

> the crux of plaintiff's complaint is that the Board, in conspiracy with the defendants trade associations, Biondi, Feid and Muller has enforced N.J.A.C. 13:32-1.12 in such a manner as to effectively force plumbers to charge a fixed price for services.

In other words, Petitioner's claims derive exclusively from their contention that the Board has not implemented N.J.A.C. 13:32-1.12 for reasons of proper public policy, but rather has used the rule to fix prices and has done so as a result of a conspiracy with the Trade Associations, Biondi, Feid and Muller. As noted above, such an allegation cannot serve as the basis for a Sherman Act claim against any of the Respondents. As a result, the dismissal of Petitioners' complaint as to all Respondents by the District Court and the affirmance of that dismissal by the Court of Appeals were correct and should be affirmed.

II.

THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS IN THIS CASE ARE IN NO WAY INCONSISTENT WITH THE DECISIONS OF THIS COURT IN *CALIFORNIA RETAIL LIQUOR DEALERS ASS'N v. MIDCAL ALUMINUM, INC.*, 445 U.S. 97 (1980) OR *FEDERAL TRADE COMMISSION v. TICOR TITLE INSURANCE COMPANY*, 504 U.S. 621 (1992).

Petitioners have argued that this Court should grant certiorari because the decisions of the District Court and the Third Circuit Court of Appeals are allegedly inconsistent with the decisions of this Court in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) and *Federal Trade Commission v. Ticor Title Insurance Company*,

504 U.S. 621 (1992). However, neither of those cases is applicable to the facts herein.[6] Those cases involved regulatory schemes which on their face delegated to private parties the authority to set prices without any involvement by a government agency in evaluating the reasonableness of the prices set. In this case, even if the implementation of N.J.A.C. 13:32-1.12 is treated as price fixing, nothing in the regulation delegates any authority to a private party. All decisions under N.J.A.C. 13:32-1.12 are to be made by the Board. The allegations of involvement by private parties is dependant on the existence of an alleged conspiracy and, as noted above, allegations of conspiracy cannot remove an otherwise immune governmental activity from the state action exception to the anti-trust laws.

In *Midcal,* the challenged state law authorized private producers of wine to fix the prices to be charged by wholesalers. By the terms of the statute in question, the state had no control over the privately set prices and did not review their reasonableness. 445 U.S. at 100, 105. Similarly, in *Ticor,* private title search companies were granted authority under state law to fix prices which they could charge for their services and the states merely reserved the authority to veto those prices, if they chose to exercise it. There was no requirement that the states review the rates set before they became enforceable as matter of law. 504 U.S. at 639-31, 637.

By contrast, the regulatory scheme at issue in this case did not cede any authority to fix prices (or for that matter to take any action whatsoever) to private parties. Indeed, the regulations in question do not even relate to price fixing. They relate to the prohibition of excessive prices — a subject which is surely an

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6. Plaintiffs also contend that the decisions below suggest that *Omni* overruled *Midcal.* This is not the case. As noted above, *Midcal* is perfectly consistent with *Omni* as it has been applied in this case.

appropriate subject for state regulation of professional practices. Pursuant to N.J.A.C. 13:32-1.12, it is the Board and only the Board which can decide whether a particular plumber has charged excessive prices. Thus, it is the actions of the Board which have allegedly fixed prices not the actions of a private party.[7]

Petitioners' allegation is that the Board did not abide by its responsibilities under N.J.A.C. 13:32-1.12 to prohibit excessive prices, but instead used the regulation to fix prices. Petitioners allege that the Board acted in this manner because of a conspiracy with the Trade Associations, Biondi, Feid and Muller. Thus, this case falls, not within the holdings of *Midcal* and *Ticor* (that legislative and regulatory schemes which cede authority from state government to private parties may not be subject to state action immunity), but within the holding of *Omni* (that an alleged conspiracy by a state agency with a private party will not create an exception to state action immunity to the Sherman Act).

Despite Petitioners' efforts to complicate matters, the position of the Trade Associations is simple. Petitioners' complaint is grounded in the allegation that, as a result of a conspiracy between the Board, the Trade Associations and the Individual Respondents, the Board has used N.J.A.C. 13:32-

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7. For this reason, the question of "active supervision" by the State does not arise in this case. Active supervision must be considered in a case in which the state regulatory scheme grants authority to a private party to take anti-competitive actions. Under those circumstances, the court must consider whether the anti-competitive actions are actively supervised by the state. The issue does not arise in this case because it is the Board and not the private parties who have allegedly engaged in the anti-competitive actions which have allegedly harmed the Petitioners. As a result, the element of active supervision is not even applicable. The state action exception applies so long as the reasonably foreseeability element of the state action exception is satisfied. *See* Point III, *supra*.

1.12 as a tool for fixing prices. Thus, the plain fact remains that if N.J.A.C. 13:32-1.12 and its enforcement by the Board are immunized from prosecution under the Sherman Act, the identical charges against the Trade Associations must similarly fall. Since it is the enforcement of the Rule by the Board which is at the heart of Petitioners' charges, the alleged actions of the Trade Associations in concert with the Board could not violate the Sherman Act if the Board's adoption and enforcement of the Rule did not violate the Act. For this reason, the District Court's dismissal of all claims against all Respondents including the Trade Associations, and the Court of Appeals' affirmance thereof, should be affirmed.

III.

THE DISTRICT COURT'S DETERMINATION THAT THE REASONABLE FORESEEABILITY ELEMENT OF STATE ACTION IMMUNITY WAS SATISFIED IN THIS CASE WAS IN ACCORDANCE WITH THE PRINCIPLES SET FORTH IN *COLUMBIA v. OMNI OUTDOOR ADVERTISING,* 499 U.S. 365 (1991).

Petitioners urge that certiorari should be granted to consider whether the District Court's determination that the reasonable foreseeability element of state action immunity was satisfied in this case was in accordance with the principles set forth in *Columbia v. Omni Outdoor Advertising*. However, Petitioner's argument betrays a fundamental misconception regarding the meaning of reasonable foreseeability in this context.

Petitioners do not challenge the District Court's determination that the prohibition on excessive pricing in N.J.A.C. 13:32-1.12 was a reasonably foreseeable result of the enactment by the New Jersey State Legislature of an administrative system for the regulation of the trade of plumbing

in New Jersey. *See* Petition for Writ of Certiorari p. 16. Instead, Petitioners contend that this case does not come within the scope of state action immunity to the antitrust laws because the legislature could not have foreseen that the Board would use N.J.A.C. 13:32-1.12 as an alleged tool for the fixing of prices. However, the argument is itself inconsistent with the holding of this Court in *Omni*. In that case, this Court made it clear that the standard for reasonably foreseeability is whether the legislature foresaw or should have foreseen that legitimate and authorized governmental activity could displace competition. It is not relevant that a particular alleged use by a state agency of the authority to displace competition was allegedly not reasonably foreseeable to the state legislature.

In *Omni*, this Court held that, to satisfy the reasonable foreseeability test, "[i]t is enough . . . if suppression of competition is the 'foreseeable result' of what the statute authorizes." 499 U.S. at 373. Therefore, when the "very purpose" of the governmental activity authorized by the legislature is to "displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants", this element of state action immunity is satisfied. *Id.* In *Omni*, this Court made it clear that an alleged use of that authority to restrict competition in a manner which was not intended by the legislature is irrelevant for the purpose of this analysis. Thus, this Court concluded that because zoning by its very nature displaces competition, the alleged misuse of the zoning authority by the City of Columbia to favor one competitor over another was within the reasonable foreseeability prong of state action immunity. *See also Fisichelli v. City Known As Town of Methuen*, 956 F.2d 12 (1st Cir. 1992)(Breyer, J.) (suppression of competition was foreseeable result of authority to grant or deny a development bond in context of state action exception analysis).

Similarly, in this case, the "very purpose" of the governmental activities in question was to "displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition." Regulation of licensed professionals is perhaps the quintessential example of a displacement of competition by government. In New Jersey, as in most other states, there is a policy of displacing the market in connection with such professionals. *See* N.J.S.A., Title 45.

Moreover, the regulation at issue was a prohibition on unconscionable pricing and there is a clear state policy against unconscionable pricing. *See e.g. American Trial Lawyers Association v. New Jersey Supreme Court,* 66 N.J. 258, 265 (1974) (practice of law). Obviously, a prohibition on unconscionable prices must, by its very nature, limit competition. If competition were allowed free reign, any pricing, no matter how unconscionable, would be permissible.

The allegations in this case are of the same nature as the allegations in *Omni.* In both cases the authorized governmental activity is of a kind which will foreseeably displace competition. However, in this case, as in *Omni*, the plaintiff contends that the legislature could not have foreseen that the authorized power would be used in the manner alleged, *i.e.*, as an alleged tool of a private party as a result of a conspiracy between the governmental body and the private party. This Court rejected that argument in *Omni.* Accordingly, the decisions of the District Court and the affirmance by the Third Circuit Court of Appeals are totally in accord with the decisions of this Court on the issue of reasonable foreseeability as well. There is no grounds for Petitioners' Petition for a Writ of Certiorari.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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